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No. 92-407

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In The

Supreme Court of the United States

October Term, 1992

REXFORD MURPHY AND DEBBIE FIELDS MURPHY, PARENTS AND NEXT FRIENDS OF CHRISTOPHER CARL MURPHY,

Petitioners,

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

FRED W. PHIFER
Attorney for Petitioners
303 West Washington Avenue
Rocky Ford, Colorado 81067

Of Counsel:

ROBERT T. MOXLEY
GAGE AND MOXLEY
1920 Thomes Avenue, Suite 320
P.O. Box 1223
Cheyenne, Wyoming 82003-1223
(307) 632-1112

2463
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

The Childhood Vaccine Compensation Act (42 U.S.C. §§300aa-10 *et seq.*) creates a statutory claim for vaccine injury compensation from an appropriated fund. The Act envisions "informal" proceedings conducted by the Office of the Special Masters of the United States Claims Court, and envisions the opportunity for summary judgment. The Claims Court Special Master herein denied an evidentiary hearing, and ruled that a variable, initially latent preexisting condition was an absolute defense. In denying four separate injury claims, the Special Master was required to reconcile substantial conflicts of evidence in the written record.

The questions presented are:

1. Will the Due Process Clause of the Fifth Amendment of the United States Constitution countenance the resolution of disputed medical and testimonial questions without a trial-type hearing, in proceedings under the Vaccine Act?

2. Do the standards of summary judgment law establish the constitutional threshold for the use of trial-type procedure, in the adjudication of a federally-created property right?

3. Should this Court supervise the development of the substantive doctrine in Vaccine Compensation law, where an erroneous controlling doctrine, with conflicting views in the Claims Court, will impact hundreds of pending cases?

LIST OF PARTIES

All parties to this and all related litigation are listed in the caption hereof.

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SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Rexford Murphy and Debbie Fields Murphy, parents and next friends of Christopher Carl Murphy, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in

the above entitled proceeding on May 6, 1992, rehearing denied June 4, 1992, said review to include the underlying orders of the United States Claims Court and its Office of Special Masters.

OPINIONS BELOW

The affirmance without opinion and judgment of the Court of Appeals for the Federal Circuit is an Unpublished Disposition, 1992 W.L. 90552 (Fed. Cir.). The final judgment is reprinted in the Appendix hereto, page 1a, *infra*. The order denying petition for rehearing is found at page 3a; the initial judgment without opinion is at 5a, *infra*.

The Opinion of the United States Claims Court (Nettesheim, J.) is reported at 23 Cl. Ct. 726 (1991). It is reprinted in the Appendix hereto, page 10a, *infra*. Its judgment is at 8a, *infra*.

The Decision of the Office of Special Masters of the United States Claims Court (Special Master Paul T. Baird) has not been reported. It is reprinted in the Appendix hereto, page 30a, *infra*.

The Order of the Office of Special Masters, which contains the decision denying an evidentiary hearing, has not been reported. It is reprinted in the Appendix hereto, page 46a, *infra*.

STATEMENT OF JURISDICTION

Invoking the federal jurisdiction of the United States Claims Court under 42 U.S.C. §§300aa-10 *et seq*., the petitioners brought this action on the 5th day of September, 1990. On April 19, 1991, the Office of Special Masters denied petitioners' motion for an evidentiary hearing. See page 46a, *infra*.

On the 25th day of April, 1991, the Office of Special Masters issued a decision denying vaccine injury compensation. *See* page 30a, *infra*.

On petitioners' Motion for Review, the Claims Court, pursuant to 42 U.S.C. §300aa-12(e)(2)(a), sustained and upheld the Special Master's decision. *See* page 10a, *infra.*

On petitioners' appeal under 42 U.S.C. §300aa-12(f), the Federal Circuit, on May 6, 1992, affirmed without opinion pursuant to Fed. Cir. R. 36. *See* page 5a, *infra.* Rehearing was denied June 4, 1992. *See* page 3a, *infra.*

The jurisdiction of this Court to review the judgment and underlying orders is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 14(f), petitioners cite the black-letter laws involved in this case, the pertinent text of which are set forth in the Appendix hereto, *infra.*

Constitutional Provision: The Fifth Amendment of the United States Constitution. *See* page 50a, *infra.*

Statutory Provisions: That provision of the Vaccine Act establishing Court and Special Master jurisdiction, 42 U.S.C. §300aa-12. *See* page 51a, *infra.* That provision of the Vaccine Act setting forth the standard for determination of eligibility and compensation, 42 U.S.C. §300aa-13. *See* page 60a, *infra.* That provision of the Vaccine Act known as the Vaccine Injury Table, with aids and qualifications to interpretation, from 42 U.S.C. §300aa-14. *See* page 63a, *infra.* That provision of the Vaccine Act defining vaccine injuries and significant aggravation, from 42 U.S.C. §300aa-33. *See* page 69a, *infra.*

Regulations: Those provisions of the Vaccine Rules of the Office of Special Masters of the United States Claims Court, which set forth hearing procedures, from Appendix J, RUSCC. *See* page

70a, *infra.* Those pertinent provisions of the Guidelines for Practice Under the National Vaccine Injury Compensation Program. *See* page 76a, *infra.*

STATEMENT OF THE CASE

This case features the plight of Christopher Murphy, a severely handicapped and disabled, multiply vaccine-injured child from Snow Hill, North Carolina. Christopher has Tuberous Sclerosis (hereinafter "TS"), a variable, often benign genetic condition which holds enormous potential for devastating injury via childhood immunizations. Christopher was unfortunate enough to be the petitioner in an early case in the history of the Childhood Vaccine Compensation Program, losing on "summary judgment" at a time when the respondent and the Court regarded TS as an "alternate cause" defense to compensation claims related to the seizure disorders which childhood vaccines often provoke in TS children.

Christopher's parents pleaded a "Table Case;" that is, they claimed an injury described by the Vaccine Injury Table, 42 U.S.C. §300aa-14. This claim supports the first material dispute of fact in the record below, to-wit, the issue of whether the seizure disorder did or did not arise within 72 hours of the first vaccination. Christopher's mother, Debbie Fields Murphy, testified under oath in a sworn affidavit that this was indeed the case. There is inferential corroboration of this fact in other affidavits.

As the case developed, and expert analysis was performed, the final, amended petition disclosed three more injuries under the "significant aggravation" language of the statute. There is record evidence that these injuries occurred in association with the second DPT vaccination (November 11, 1976), the third DPT vaccination (December 13, 1976), and the fourth DPT vaccination (March 14, 1978).

There is a material dispute of fact on the record as to the

occurrence of these significant aggravation injuries. A developmental expert's report demonstrates that the aggravations occurred; a medical doctor's opinion relates them to the vaccines. However, the Special Master, without a hearing to resolve the conflicts, adopted the thrust of a scientifically dishonest and inappropriately directed "Respondent's Report." This report was explicit in forwarding the notion that a majority of people with TS have an outcome like Christopher's. This fact is not true, as has been proven in later omnibus proceedings which have consolidated all TS vaccine injury cases together, for trial by another Special Master. Even on the state of the record below, however, there is a material dispute of fact as to the essential nature of TS. These findings below are very much at odds with reality; a far more accurate picture has been drawn in the consolidated proceedings, in the case of *Costa v. Secretary of DHHS*, Case No. 90-1476V (Cl. Ct. Special Master, decided February 22, 1992), vacated and remanded ___Cl. Ct.____ (1992) (Decided August 7, 1992).

The materiality of these many disputes of fact prompted the petitioners' counsel to request an evidentiary hearing. This was first raised by oral motion on the occasion of a March 11, 1991 status conference, prior to full development of the record. The Special Master indicated an inclination to rule against petitioners, without a hearing, based on the "evidentiary weight" of the medical records. But after strong urging from petitioners' counsel, the Special Master then ruled to allow the supplementation of the showing from the fact witnesses. At the same time (March 28, 1991) as petitioners filed their supplemental factual showing, they filed a written Motion for Evidentiary Hearing, accompanied by a brief (Memorandum of Law In Support of Motion for Evidentiary Hearing), voicing concerns with constitutional due process, should the petition be denied without a hearing.

There ensued an exchange of documents between petitioners

and the Court. These documents crossed in the mail, and as a result, were written without knowledge of the existence of the others. On April 19, 1991, petitioners mailed to the Court a "Statement of Position," etc., to amplify on due process concerns in denial of hearing; on the same day the Special Master entered his Order denying the Motion for Evidentiary Hearing. This April 19, 1991, Order announced the Special Master's intention to rule on the case by May 3, 1991.

On April 26, 1991, counsel for the petitioners filed a "Request for Reconsideration," etc., accompanied by a detailed brief on the merits of all four injury claims. But on April 25, 1991, the Special Master had issued his Decision, denying compensation. Because the earlier "Statement of Position" was sent back unfiled as moot, counsel sought to file it for record-making purposes; the application for such relief was denied as moot. The motion for reconsideration was denied by Order of May 1, 1991; a review proceeding in the Claims Court followed from the April 25, 1991, Decision.

The petitioners subsequently filed a Motion for Review by the United States Claims Court, as contemplated by 42 U.S.C. §300aa-12(e). After affirmance by the Claims Court on August 9, 1991, petitioners appealed in a timely fashion to the United States Court of Appeals for the Federal Circuit, pursuant to 42 U.S.C. §300aa-12(f).

Upon the review proceeding in the Claims Court, Judge Nettesheim held that the Special Master had not abused his discretion in fact finding matters or in hearing denial. The due process claim was not adjudicated or mentioned, except for cryptic reference in footnotes. At footnote 4 (Appendix, *infra*, at 20a), the Court observed the due process argument concerning overemphasis on "expediency;" and at footnote 9 (Appendix, *infra*, at 29a), the Court noted that all arguments had been

considered. The holding was simply that neither the statute nor case law would require an evidentiary hearing. The statutory petition for review to the Federal Circuit resulted in an order affirming without opinion, pursuant to Fed. Cir. R. 36.

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS BELOW DENYING AN EVIDENTIARY HEARING ARE IN CONFLICT WITH THE RULINGS OF THIS COURT WHICH DEFINE THE RIGHT TO CONSTITUTIONAL DUE PROCESS.

The Special Master of the Claims Court made the ruling herein, on April 19, 1991, that, "if there is a bias under the law" (the Vaccine Act, 42 U.S.C. §300aa-10 *et seq.)*, "it is against, not in favor of, the conduct of evidentiary hearings on vaccine petitions." (Appendix, *infra*, page 48a).

Similarly, Judge Christine Cook Nettesheim ruled that the Act affords the Special Master "the power to deny an evidentiary hearing." *Murphy v. Secretary of DHHS*, 23 Cl. Ct. 726, 730 (1991). Both these decisions rely on statutory construction, ignoring constitutional factors.

Significantly, the Special Master noted the pendency of "some 4,000 petitions." April 19 Order, n. 3 (Appendix, *infra*, page 48a). The impact of the *Murphy* ruling on hearings, then, may cause, in fact must cause, the denial of due process to other Program participants. (*See* Argument, *infra*).

The ruling against the petitioners is in its essence a finding against the credibility of the petitioners. The Claims Court held that the Special Master could "reasonably conclude," despite the

mother's 15 page affidavit and supportive materials, that "there is nothing which could be testified to at an evidentiary hearing which would affect the outcome of the case." *Murphy, supra*, 23 Cl. Ct. at 731, quoting the order denying hearing (Appendix, *infra*, page 49a) at page 3.

This Court has squarely rejected both the notion that legislation can curtail due process, and the proposition that credibility can be determined without the opportunity to be heard. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), this Court held that it is particularly inappropriate to resolve disputed issues of credibility without cross examination, and as it were, confrontation. This is reiterated in *Califano v. Yamisake*, 442 U.S. 682, 697, 99 S. Ct. 2545, 2555, 61 L. Ed. 2d 176 (1979), holding that written submissions are a particularly inappropriate way, in the colorful words of Justice Blackmun, "to distinguish a genuine hard luck story from fabricated tall tale." Inasmuch as the affidavit of Debbie Fields Murphy was rejected out of hand as the latter, she deserves a day in court to explain the conflicts which Special Master Baird was all too eager to resolve against her. *Califano* analyzes the issue in terms of the risk of error in the truth-finding process, and this Court should grant the writ to forcefully announce a rule which removes such a risk from Vaccine Act adjudication.

The legislative curtailment of due process has been dubbed the rule that the litigant must take "the bitter with the sweet." *See, e.g., Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), which rejected the doctrine with a plurality vote. Rejection of the doctrine has since been explicitly announced in the majority opinion of *Loudermill v. Cleveland Board of Education*, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985):

> . . . it is settled that the "bitter with the sweet" approach misconceives the constitutional

> guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.

The deprivation of a protected interest without a hearing has been held time and time again to offend due process. But the government has taken the position throughout that the Vaccine Act petitioner does not have a "property" interest. The government has likened vaccine compensation to nothing beyond "a statutory benefit clearly at the discretion of an agency," *citing Jean v. Nelson*, 727 F.2d 957, 981 (1st Cir.), *aff'd*, 469 U.S. 1071 (1984). Federal Circuit Brief for Appellee, pages 22-23.

At oral argument before the Federal Circuit, counsel for the government asserted that no property right arises until the petitioner wins his or her case. This is clearly bad law, and a gross imposition on the 3,000 or more remaining petitioners. This Court has rejected the idea that the right to a hearing depends on certain success. *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1053, 55 L. Ed. 2d 252 (1978). And the idea that a claim under the Vaccine Act is *not* property is absurd:

> . . . the types of interests protected as "property" are varied, and, as often as not, intangible, relating "to the whole domain of social and economic fact." (citations).

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31, 102 S. Ct. 1148, 1155, 71 L. Ed. 2d 265 (1982).

Thus, the preliminary question of the nature of the interest must be addressed; however, the resolution of the question is not a close call. The situation is simply that the Courts below failed to engage in the two-part inquiry which is essential. *See Logan v. Zimmerman Brush Co., supra.*

II.

SUMMARY JUDGMENT PROCEDURE SHOULD SET THE THRESHOLD FOR THE RIGHT TO AN EVIDENTIARY HEARING IN VACCINE LAW.

The problem in this case is the need for a uniform rule, a problem of basic statutory construction. While the Vaccine Act at 42 U.S.C. § 300aa-12(c)(2)(C) mandates that the Special Masters' recommended rules "include the opportunity for summary judgment," Special Master Baird ruled herein that Vaccine Rule 8(d), in its first sentence ("The Special Master may decide a case on the basis of written findings . . ."), indicates that "a case need not meet the summary judgment criteria to be decided on written filings." (April 19 Order, n. 2, page 48a, *infra).* The Claims Court—ignoring the thrust of *Hale v. Secretary of DHHS,* 22 Cl. Ct. 403 (1991)—upheld this outcome on the basis of the Special Master's "extensive discretion in conducting proceedings." *Murphy, supra,* 23 Cl. Ct. at 730, page 17a, *infra.* This holding ignores the overall tenor of the statute and guidelines, especially the incorporation into Vaccine Rule 8(b) of the constitutional concept of "fundamental fairness."

The statute, in its entirety, does not truly contemplate the *denial* of a hearing. Rather, paying lip service to the idea (now totally abandoned) of less adversarial proceedings, the statute and rules afford flexibility with the input of the parties.

Thus, the Special Master under Vaccine Rule 5 is guided by a provision which states that at informal conferences there may be tentative findings, but that "*petitioner* and respondent *shall advise whether either requests further proceedings, including* filing of a dispositive motion(s) or *a hearing* . . ." (emphasis added). Clearly, the choice of method seems to depend, somewhat, on the petitioners' willingness to allow it. Vaccine Rule 6 allows the parties explicitly to "propose" procedures. Vaccine Rule 8(a) provides that the format for "*taking evidence and hearing argument . . . will be ordered after consultation* with the parties."

There is significant import to be drawn from the choice of legislative wording in Section 12(d)(2)(D) whereby Special Masters "include the *opportunity for parties* to submit arguments and evidence on the record without routine use" (of hearings). And Guideline IX contemplates that a Special Master "will ordinarily accept a party's evidence in the form desired by the party," adding the caveat that cross examination and explanation will augment the weight of testimony(Appendix, page 80a, *infra*).

Misinterpreting the statute, in finding the right to decide the case on "evidence" in the record, Judge Nettesheim neglected to note that §300aa-12(d)(3)(B)(iv) has two subsections. These subsections explicitly restrict written submissions to specific subject matter. Subsection (I) speaks to the subject matter of Section § 300aa-13(a)(1)(B), "factors unrelated to vaccines."

Subsection (II) speaks to the subject matter of § 300aa-11(c)(l)(C)(ii), to-wit, actual (as opposed to presumed) causation. These written submissions are *not evidence* in and of themselves. Subsection (I) contemplates written submissions "relating to *the existence of the evidence,*" and subsection (II) contemplates written submissions "relating to any *allegation in a petition.*" (emphasis added). Moreover, § 300aa-12(b)(i) specifically states that the Special Master may require reasonable and necessary

evidence. This language would be superfluous and repetitive if § 300aa-12(d)(3)(B)(iv) was concerned with "evidence." Rather, subsection (B)(iv) is obviously concerned with using written submissions to refine and formulate the issues.

The soiution to this pernicious state of affairs is obvious and easy to accomplish. The rules of summary judgment law, from, *e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), must be enforced. Whereas discovery in vaccine proceedings is redacted by 42 U.S.C. § 300aa-12(d)(2)(E), the procedure which the Special Master actually used herein, of liberally allowing supplemental filings, should continue. But at the end, where there are fully developed, material and complicated disputes of fact, there must be a trial. The vaccine petitioner, like any other citizen, should be afforded a day in court.

III.

THE COURT MUST EXERCISE ITS SUPERVISORY JURISDICTION TO CORRECT SUBSTANTIVE DOCTRINE WHICH HAS GONE AWRY EARLY IN THE EVOLUTION OF AN ONGOING PROGRAM.

The Special Master in this case, Paul G. Baird, is the author of an *ex cathedra* doctrine[1] which imposes an undue burden on the petitioners in any vaccine case where a "preexisting condition" is implicated. As contemplated by Rule 17.1(a) of this Court,

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1. The doctrine is called the *Misasi* rule, from *Misasi v. Secretary of DHHS*, 23 Cl. Ct. 322 (1991). This case is the first "citation omitted" which is found in the Claims Court opinion, 23 Cl. Ct. at 732 (page 23a, *infra*). It originated in *First Commercial Bank for Clark v. Secretary of DHHS*, Case No. 90-537V (Cl. Ct. Spl. Mstr. Feb. 25, 1991), the second "citation omitted," and is arguably modified in the Claims Court case of *O'Connor v. Secretary of DHHS*, 24 Cl. Ct. 428 (1991), Federal Circuit Appeal No. 92-5031, affirmed without opinion, rehearing denied, suggestion for rehearing in banc pending.

certiorari is indicated because this doctrine so far departs from the accepted course of judicial proceedings as to call for supervision .

The *Misasi* doctrine is an apportionment doctrine without a statutory basis. This violates the general rule in compensation law:

> Nothing is better established in compensation law than the rule that when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in three states having *special statutes* on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability. Apportionment does not apply in such cases.

Reynolds v. Ruidoso Racing Association, Inc., 365 P.2d 671, 674 (N. Mex. 1961), *citing* 2 *Larson's Workmen's Compensation*, p. 56, § 59.20 (emphasis added).

Moreover, *Misasi* proceeds from the premise that any *tendency* toward injury is a "preexisting condition," and that therefore the "significant aggravation" provisions of the law are implicated. This is also contrary to mainstream compensation law. Ordinarily, a condition must be already symptomatic before it can be "aggravated." *See, e.g., Hoppin v. Industrial Commission of Arizona*, 692 P.2d 297 (Ariz. App. 1984); *Matter of Compensation of Aquillon*, 653 P.2d 264 (Or. App. 1982); *Self v. Starr Davis Co.*, 187 S.E. 2d 466 (N.C. 1972); and *Reynolds v. Ruidoso Racing Association, Inc.*, 365 P.2d 671 (N. Mex. 1961).

The fatal flaw of *Misasi* is the default assumption that vaccine injuries—seizure disorders and encephalopathies, generally—are

"divisible" injuries, which can be neatly separated from the "preexisting" condition. Symptomatic or not, the preexisting condition is almost always seen as an encephalopathy or seizure disorder, at least potentially. Similarly, so is the "aggravated" condition. The law in virtually all other arenas features the sequential analysis outlined in §§ 433A and 433B of the *Restatement (Second) of Torts*, which requires the Court to find first, as a matter of law, that the injuries *are* divisible. Only after this legal finding does the Restatement view impose any burden of apportionment, and it is then imposed *on the defendant*. This is the law applied under other federal statutory schemes, under, *e.g.*, CERCLA, which deals with pollution. *Compare, United States v. A. & F. Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ill. 1985) and *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

Ultimately, *Misasi* creates the potential for an absurd result, in that *if* apportionment can be done (otherwise, petitioners lose), it could lead to a reduced award, whereby the Special Master restricts compensation to only the needs "resulting from" the vaccine injury. Meanwhile, under 42 U.S.C. § 300aa-15(g)(2) and (h)(2), the award disqualifies the mentally retarded and developmentally disabled child from the alternate federal programs which supposedly are to meet basic needs. Ultimately, the child most prone to injury—a category which contains a high proportion of all vaccine petitioners—is the least apt to recover, and generally will be relegated to a "least served" status if recovery occurs.

Application of the *Misasi* doctrine has been held to be an "impossibility" in TS cases. *Costa v. Secretary of DHHS*, Case No. 90-1476V (Cl. Ct. Spl. Mstr. February 26, 1992), slip opinion at 41 21 ("Beside the impossibility . . . of the standard *Misasi* sets up . . . is the further problem of its . . . holding that petitioners in *Misasi* failed to satisfy their burden of proof because they could not quantify what portion of the child's disability was due to the

vaccine. . . . Under common tort law, the burden for apportioning the damage due to an innocent cause and due to defendant's negligence rests on the defendant, not the plaintiff").

Nonetheless, the Claims Court in *Costa* would not critically address *Misasi,* nor for that matter, does the Federal Circuit seem willing, witness the affirmances without opinion herein and in *O'Connor, supra.* In fact, *Costa* was vacated by the Claims Court on interlocutory appeal, on the 7th day of August, 1992, with a not-very-coherent reaffirmation of *Misasi.* A motion to certify for permissive interlocutory appeal to the Federal Circuit is yet pending. Meanwhile, about 30 TS cases are suspended and may be litigated piecemeal, instead of in the omnibus fashion contemplated by the Special Master's original *Costa* decision. The situation cries out for supervision, because the Special Master in *Costa* was in fact legally correct. And not only the TS cases are impacted, but also any and all "significant aggravation" cases, of which there are dozens, if not hundreds, more.

CONCLUSION

Certiorari is appropriate herein for numerous compelling reasons. The total misapprehension of the precedents of this Court is an appropriate basis in itself. *See, e.g., Army and Air Force Exchange Service v. Sheehan,* 456 U.S. 728, 733, 102 S. Ct. 2118, 2121-22, 72 L. Ed. 2d 520 (1982) (*cert. granted* because of ruling in conflict with Supreme Court precedents); *Schlude v. C.I.R.,* 372 U.S. 128, 130, 83 S. Ct. 601, 602, 9 L. Ed. 2d 633 (1963) (*cert. granted* because lower court misapprehended the scope of a prior Supreme Court ruling); *Wilkinson v. United States,* 365 U.S. 399, 81 S. Ct. 567, 5 L. Ed. 2d 633 (1961) (*cert. granted* because lower court misconceived the meaning of prior decision). More specifically, the importance of enforcing due process justifies a decision on the question presented. *See Fuller v. Oregon,* 417 U.S. 40, 42, 94 S. Ct. 2116, 2119, 40 L. Ed. 2d 642 (1974).

Moreover, certiorari is appropriate to meet the need to authoritatively settle questions which are at the core of other pending litigation. *See Maryland for the Use of Levin v. United States*, 381 U.S. 41, 43, 85 S. Ct. 1293, 14 L. Ed. 2d 205 (1965); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 84 S. Ct. 1236, 12 L. Ed. 2d 268 (1964); and *Watson v. Commissioner of Internal Revenue*, 345 U.S. 544, 73 S. Ct. 848, 97 L. Ed. 2d 1232 (1953).

Ultimately, the most compelling need is the reaffirmation of a basic doctrine ignored herein. Without such reaffirmation this crucial doctrine is certain to be ignored in the 3,000 pending cases. It is also certain to be ignored in the up to 150 meritorious cases per year which the Act contemplates. 42 U.S.C. § 300aa-34. This is the doctrine that compensation laws are to be liberally construed in conformity with their purposes, in a manner which is calculated to avoid harsh and incongruous results. *Director, Office of Worker's Compensation Programs, U.S. Department of Labor v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983). No more basic error occurs in Vaccine law than the way which the Special Masters flout this doctrine. The case of Christopher Murphy is the avatar of an inappropriate attitude. It should be subject to the writ, and reversed with the articulation of a new direction for vaccine compensation law.

Respectfully submitted,

FRED W. PHIFER
Attorney for Petitioners
303 West Washington Avenue
Rocky Ford, Colorado 81067

ROBERT T. MOXLEY
GAGE AND MOXLEY
Of Counsel
1920 Thomes Avenue
Suite 320
P.O. Box 1223
Cheyenne, Wyoming 82003-1223
(307) 632-1112

APPENDIX A - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ISSUED ENTERED AS A MANDATE JUNE 11, 1992

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published perlodlically.

92-5002

REXFORD MURPHY and DEBBIE FIELDS MURPHY, parents and next friends of CHRISTOPHER CARL MURPHY,

Petitioners/Appellants,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent/Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court

in CASE NO(S). 90-1476V

This CAUSE having been considered, is

ORDERED and ADJUDGED:

Appendix A

PER CURIAM (ARCHER, MAYER and MICHEL, *Circuit Judges*):

AFFIRMED. Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

s/ Francis X. Gindhart
FRANCIS X. GINDHART

DATED May 6, 1992

COSTS: Against, Appellant.
PRINTING ——————$374.16
TOTAL ——————-$374.16

ISSUED AS A MANDATE: June 11, 1992

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 4, 1992

ORDER

Before ARCHER, Circuit Judge, MAYER, Circuit Judge, MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on June 11, 1992.

FOR THE COURT,

s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: June 4, 1992

cc: ROBERT T. MOXLEY
MARY HAMPTON MASON

Appendix B

FRANCIS X. GINDHART
Clerk

MURPHY V HHS, 92-5002
(CLM - 90-882V)

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

APPENDIX C — NOTICE OF ENTRY AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ENTERED MAY 6, 1992

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: May 6, 1992

The judgment of the court in your case was entered today pursuant to Rule 36. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs may be recoverable under Rule 39. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

Appendix C

MURPHY V HHS, 92-5002
(CLM - 90-882V)

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as a precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5002

REXFORD MURPHY and DEBBIE FIELDS MURPHY, parents and next friends of CHRISTOPHER CARL MURPHY,

Petioners/Appellants,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court

in CASE 9NO(S). 90-1476V

This CAUSE having been considered, it is

ORDERED and ADJUDGED:

PER CURIAM (ARCHER, MAYER and MICHEL, *Circuit Judges*):

Appendix C

AFFIRMED Fed Cir R. 36.

ENTERED BY ORDER OF THE COURT

DATED MAY 3, 1992

s/ Francis X. Gindhart
Francis X Gindhart, Clerk

APPENDIX D — JUDGMENT OF UNITED STATES CLAIMS COURT FILED AUGUST 9, 1991

IN THE UNITED STATES CLAIMS COURT

No. 90-882 V

REXFORD MURPHY AND DEBBIE FIELDS MURPHY, PARENT S AND NEXT FRIENDS OF CHRISTOPHER CARL MURPHY

v.

SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES

JUDGMENT

Pursuant to the court's opinion of August 9, 1991, sustaining the decision of the special master, filed April 25, 1991,

IT IS ORDERED AND ADJUDGED this date, pursuant to Appendix J 8(a), that the petition is dismissed.

David A. Lampen
Clerk of Court

August 9, 1991

By: Illegible
Deputy Clerk

NOTE: As to election, 90 days from this date or the issuance of the appellate court's mandate, see Appendix J para. 11.

Appendix D

As to attorneys' fees and costs, within 21 days of the above election, see Appendix J para. 12.

As to petition for review, 60 days from this date, see Appendix J para. 10. Petition for review and filing fee of $100.00 should be mailed to the following address: Clerk, U. S. Court of Appeals for the Federal Circuit, 717 Madison Place NW, Washington, DC 20439.

APPENDIX E — OPINION OF UNITED STATES CLAIMS COURT FILED AUGUST 9, 1991

In the United States Claims Court

No. 90-882V
(Filed August 9, 1991)

REXFORD MURPHY and DEBBE FIELDS MURPHY, parents and next friends of CHRISTOPHER CARL MURPHY,

Petitioners,

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert T. Moxley Gage and Moxley, Cheyenne, Wyoming, for petitioners.

Mary Hampton Mason Washington, D.C., with whom was *Assistant Attorney General Stuart M. Gerson* for respondent.

OPINION

NETTESHEIM, Judge.

This case is before the court on petitioners' motion for review of a special master's dismissal of their petition for compensation brought under the National Childhood Vaccine injury Act of 1986, 42 U.S.C. § § 300aa-1 - 300aa-34 (1988), *as amended* by several

Appendix E

public laws codified in 42 U.S.C.A. § § 300aa-1 - 300aa-34 (West Supp. 1991) ("the Act"). The issues upon review are whether the special master's denial of petitioners' motion for an evidentiary hearing, his interpretation of what constitutes "significant aggravation" of a seizure disorder, and his findings were arbitrary and capricious. Argument is deemed unnecessary.

FACTS

The following facts found by the special master or in the record before the special master are not contested, unless otherwise noted. Christopher Carl Murphy was born on August 28, 1976, in Pitt County Memorial Hospital ("Pitt Memorial"), Greenville, North Carolina, to Rexford and Debbie Fields Murphy ("petitioners"). Although Mrs. Murphy experienced vaginal bleeding, as well as the threat of premature labor in her sixth month of pregnancy, Christopher was pronounced a healthy baby upon delivery, weighing 8 pounds, 5 ounces, with APGAR scores of 9 and 10. Christopher's head size at birth was 36 centimeters ("cm."), which placed him in the 85th percentile for newborn males.

On September 16, 1976, Christopher received his first well-baby checkup. The doctor noted that his head size had increased to 39 cm., which placed Christopher in the 97th percentile for males. In her supplemental affidavit dated March 27, 1991, Mrs. Murphy revealed that the doctor discussed the possibility of hydrocephalus or other neurological problems with her on this occasion. Supplemental Affidavit of Debbie Fields Murphy, Mar. 27, 1991, ¶14.

Christopher returned to the doctor for a checkup on October 11, 1976. His head had grown to 41 cm., an abnormally large size. The doctor again raised the possibility of neurological problems. He

also noted two white ash leaf-shaped spots on Christopher's chest, suggesting that they might be symptoms of a very rare disease. Christopher received his first DPT shot during this visit.

In her March 27, 1991 supplemental affidavit, Mrs. Murphy avers the following series of events after the vaccination:

> Within eight hours of his first DPT shot Christopher began to have three symptoms of a reaction to the vaccine, unusual high pitched shrill screaming of hours' duration, periods where he would go completely limp for a few seconds (symptoms of encephalopathy) and infantile spasms(seizures). He began having episodes of prolonged unusual high pitched screaming. He was stiff as a board with his legs straight out and stiff and NOTHING could be done to console him. He acted as if he was totally unaware that we were trying to console him or were even there. The second kind of spell also started within eight hours and it was particularly noticeable as not being normal behavior in an infant when he was sitting in his infant seat. He would have clusters or series of jerking spells in which his arms would fly up and his legs out, almost identical to the infant shown in the Great Britain video on Tuberous Sclerosis having infantile spasms in series. Sometimes he would give a little cry after each jerk and/or a tear would run down his cheek, and the interval between spasms would be 10 to 50 seconds. They were not precipitated by unexpected loud noises or stimulation.

Appendix E

> Sometimes his eyes would roll to the side or back during a spasm. If you were holding him in a sitting position he would suddenly fall forward with great force over and over in series.

Suppl. Murphy Aff. ¶17 (emphasis in original). Although Mrs. Murphy submitted a 1978 calendar and a handwritten diary recording significant events in Christopher's early years, her calendar and diary entries did not note this information. Mrs. Murphy claims that she discussed these episodes with doctors by telephone, but no medical reports were submitted that verified these conversations.

Mrs. Murphy, however, did take Christopher to the emergency room at Pitt Memorial on October 18, 1976, after a three-hour crying spell that was followed by high-pitched shrill crying and screaming for about an hour.[1] The examining doctor suspected that gas pains were the cause of the spells and found him to be normal in other respects. Mrs. Murphy noted the "piercing screaming for [an] hour" in her diary for October 18, 1976.

Christopher received his second DPT shot on November 11, 1976. During the visit, his head size measured 43 cm. The only comment noted by the doctor was Christopher's decreased irritability after administration of the second vaccine. Mrs. Murphy claims that "Chris's screaming and jerking spells (infantile spasms) immediately worsened, dramatically, and he could not go to sleep because the jerking spells kept waking him up every time he would

---

1. Mrs. Murphy's supplemental affidavit states, "[Christopher] had a spell of high pitched shrill screaming of three hours duration ...." Suppl. Murphy Aff. ¶8.

doze off." Suppl. Murphy Aff. ¶112. Mrs. Murphy did not record this reaction in her diary.

On November 27, 1976, Christopher experienced his first documented seizure. At this time he was admitted to Pitt Memorial and diagnosed as having a seizure disorder. The hospital records note his background as "essentially benign" with the exception of his large head. There were no notations of any prior seizures. In addition, the result of an electroencephalogram ("EEG") test indicated an abnormal pattern consistent with a seizure disorder.

Christopher's third DPT was administered on December 13, 1976. At this time his head size measured 44.5 cm., which is highly abnormal. Christopher was treated with phenobarbital at that time and the doctor reported that he had experienced no seizures. Although Mrs. Murphy's diary did not reflect this information, her supplemental affidavit stated that "after the third DPT, Chris within eight hours showed a return of his seizures, worse than before . . ." Suppl. Murphy Aff. ¶ 116. Approximately one month later, on January 13, 1977, Christopher was admitted to Pitt Memorial as a result of his seizures. An additional medicine was prescribed, and he was released the following day.

Christopher received his fourth DPT on March 14, 1978. No medical records document an increase of seizure activity on this date. Mrs. Murphy in her diary noted that the vaccination was administered, but did not mention any change in his condition. She did, however, record a "fever" on March 15, 1978, and "screaming" on March 16, 1978, on a monthly calendar. Mrs. Murphy's supplemental affidavit states that seizure activity increased dramatically following the vaccination. Suppl. Murphy Aff. ¶ 127.

On March 30, 1978, Christopher was readmitted to Pitt

Memorial because "he was either in an almost constant staring spell with head-drop type of seizures or having grand mal seizures of long duration." Suppl. Murphy Aff. ¶ 28. During this hospitalization Christopher was diagnosed with tuberous sclerosis. At the present time Christopher is severely mentally retarded and developmentally slow, although he has not suffered seizures since 1985.[2]

On September 5,1990, petitioners filed for compensation on behalf of their minor son Christopher. Poltowing the status conference mandated by RUSCC Appendix J, (Vaccine) Rule 5, the special master issued an order allowing petitioners to file additional doctors' expert statements. Although respondent objected, petitioners' reports were filed on March 6, 1991. On March 11,1991, the special master issued a memorandum advising counsel that it was "inclined to rule against the petitioners." *Murphy v. Secretary of HHS*, No. 90-882V, Memorandum of Status Conference, at 1 (Cl. Ct. Spec. Master Mal: 11, 1991). Over respondent's objections, the special master also allowed petitioners to submit Mrs. Murphy's diary.

On March 29, 1991, petitioners submitted the diary and calendar, in addition to other affidavits. Petitioners also filed a motion for an evidentiary hearing, which was denied on April 19, 1991. Special Master Paul T. Baird issued his decision on April 25, 1991, denying compensation under the Act. *Murphy v. Secretary of HHS*. No. 90-882V, slip op. at 11 (Cl. Ct. Spec. Master Apr. 25, 1991).

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2. Mrs. Murphy's supplementat affidavit describes, and the records show, the entire medical course of Christopher's illness. Only the events that could possibly be related to the administration of the vaccine are related herein.

Appendix E

Petitioners filed on April 29, 1991, a request for reconsideration of the decision without a hearing. The special master denied the request on May 1, 1991. On May 3, 1991, petitioners moved for leave to file a necessary record document, which was denied as moot. On May 24, 1991, petitioners filed a motion in the Claims Court to review the special master's April 25, 1991 decision.

DISCUSSION

1. Standard of review

On review of a decision by a special master, the Claims Court is authorized to "set aside any findings of fact or conclusion[s] of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law." 42 U.S.C.A. § 300aa-12(e)(2)(B). The Federal Circuit recently affirmed that "this standard of review applies to all cases filed after the effective date of the [1990] amendment . . . ," *Hines v. Secretary of HHS*, No. 91-5027, slip op. at 9 (Fed. Cir. July 31, 1991), including the case at bar. The issue of whether the evidence of record warrants a conclusion that a vaccine caused an injury calls for review under the arbitrary and capricious standard. *Id.* at 19. According to the Federal Circuit, "'[A]rbitrary and capricious' is a highly deferential standard of review . . ." *Id.* at 21.

The Supreme Court, in the context of reviewing a federal agency's decision under the Administrative Procedure Act, 5 U.S.C. § 706 (1988), explained that under the arbitrary and capricious standard a reviewing court must consider "whether the [federal agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of

judgment." *Citizens To Preserve Overton Park. Inc. v. Volpe*. 401 U.S. 402, 416 (1971) (citing cases) (quoted in *Hines*, slip op. at 19). "Although . . . [the] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one . . ." *Citizens To Preserve Overton Park*, 401 U.S. at 416; *see also Hyundai Elecs. Indus. Co. v. ITC*, 899 F.2d 1204,1209 (Fed. Cir. 1990) (the "touchstone" of arbitrary, capricious, and abuse of discretion standard of review is rationality —consideration of all relevant factors absent a clear error of judgment). In *Hines* the Federal Circuit charted the course for a special master's review: 1) considering the relevant evidence in the record as a whole; 2) drawing plausible inferences from the evidence; and 3) articulating a basis for decision that is rational. *Hines*, slip op. at 18, 21.

2. Denial of evidentiary hearing

Petitioners argue that the special master arbitrarily and capriciously denied an evidentiary hearing and by doing so prevented them from a fair adjudication of their claim.

Overall, the Vaccine Rules accord the special master extensive discretion in conducting proceedings. Vaccine Rule 3(b) provides:

> The special master shall be responsible for conducting all proceedings . . . The special master shall determine the nature of the proceedings, with the goal of making the proceedings expeditious, flexible, and less adversarial, while at the same time affording each party a full and fair opportunity to present its case and creating a record sufficient to allow review of the special master's decision.

Appendix E

Vaccine Rule 8(b) directs the special master to "consider all relevant, reliable evidence, governed by principles of fundamental fairness to both parties . . ."

Both the statutory and case law instruct that the special master is not required to conduct an evidentiary hearing. The Act obligates the special master to afford all interested persons an opportunity to submit relevant written information. 42 U.S.C. § 300aa-12(d)(3)(B)(iv). The rules of procedure should "include the opportunity for parties to submit arguments and evidence on the record without requiring routine use of oral presentations, cross-examinations, or hearings." 42 U.S.C. § 300aa-12(d)(2)(D). Implementing these statutory directives, Vaccine Rule 8(a) directs the special master after consultation with the parties in each case "based on the special circumstances thereof,. . . [to] determine the format for taking evidence and having argument . . ." Rule 8(d) states: "The special master may decide a case on the basis of written filings without an evidentiary hearing . . . ";[3] The Claims Court in *Hale v. Secretary of HHS.* 22 Cl. Ct. 403 (1991), reinforced the special master's discretion to grant or deny an evidentiary hearing. "When all material facts are developed in the motion papers, a full

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3. Vaccine Rule 8(d) provides in full:

> The special master may decide a case on the basis of written filings without an evidentiary hearing. In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RUSCC 56 modified to the needs of the case.

In his April 19, 1991 order denying petitioners' motion for an evidentiary hearing, the special master stated that "a case need not meet the summary judgment criteria to be decided on the written filings . . ." He decided the case "based on the authority of the first sentence . . ., not the second." *Murphy v. Secretary of HHS*, No. 90-882V, at 2 n.2 (Cl. Ct. Spec. Master Apr. 19, 1991).

trial is useless. 'Useless' in this context means that more evidence than is already available . . . could not reasonably be expected to change the result." 22 Cl. Ct. at 408; *see Hines,* No. 91-5027, slip op. at 14-15 (since proceedings under the Act are informal and standards of admissibility are flexible and informal, "fundamental fairness" does not require opportunity to object to medical textbook before special master used it).

Not only did the special master have the power to deny an evidentiary hearing, but the record reveals that he did not act in an arbitrary or capricious manner in doing so. The special master granted petitioners' repeated requests to add evidence. Following the initial status conference on January 8, 1991, he granted petitioners leave on January 9, 1991, to submit additional statements from experts. After the special master's March 11, 1991 memorandum expressed the inclination to find against petitioners, petitioners were allowed additional time to file Mrs. Murphy's diary. When petitioners submitted, in addition to the diary, a supplemental affidavit of Mrs. Murphy, three other affidavits, and a calendar, the special master accepted the additional filings. The special master observed:

> The record comprises a detailed, 15-page factual affidavit of the mother as well as affidavits from the father and other fact witnesses; the mother's diary, calendar, and other notes; complete medical records; and reports and curriculum vitaes from expert medical witnesses for each of the parties. The record as it now stands is more than sufficient to enable the special master to reach a fair, reasoned, and informed decision on the petition. After thoroughly reviewing the

> written record, the court is persuaded that there is nothing which could be testified to at an evidentiary hearing which would affect the outcome of the case.

Murphy v. Secretary of HHS, No. 90-882V, at 2-3 (Cl. Ct. Spec. Master Apr. 19, 1991). The special master could reasonably conclude that "there is nothing which could be testified to at an evidentiary hearing which would affect the outcome of the case." *Id.* at 3.[4]

3. The special master's interpretation of "significant aggravation"

Petitioners assert that administration of the DPT vaccine triggered the advancement of tuberous sclerosis in Christopher and therefore significantly aggravated his prior condition.

a. The Act provides coverage for significant aggravation of a seizure disorder. 42 U.S.C. § 300aa-13(a)(1) provides, as a general rule:

> Compensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole —

---

4. In his April 19,1991 order denying petitioners' motion for an evidentiary hearing, the special master states: ' With some 4000 petitions pending and severe time constraints in effect for deciding them, holding an unnecessary hearing does more than just waste time and money. It seriously prejudices the other petitioners waiting in line." Order of Apr. 19, 1991, at 2 n.3. Petitioners argue that the special master denied the hearing as a matter of expediency and therefore that they were denied due process. The quoted language shows that the special master had determined that a hearing was unnecessary in the first instance. The Act grants him that discretion; indeed, the Act manifests a preference for alternatives to trial-type proceedings in resolving contested claims. The special master's elaboration on the current caseload and time constraints was not the reason for his decision not to hold a hearing.

> (A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 300aa-11(c)(1) of this title, and
>
> (B) that there is not a preponderance of the evidence that the illness . . . is due to factors unrelated to the administration of the vaccine described in the petition....

42 U.S.C. § 300aa-11(c)(1)(C)(1) addresses "significant aggravation" insofar as a petition for compensation under the Act must contain materials demonstrating that the injured person had "significantly aggravated" a condition listed in the Vaccine Injury Table, § 300aa-14(a), one of which is a seizure disorder. The Act's definition of "significant aggravation" and the statutory time period allotted for that aggravation to occur are straightforward. Section 300aa-33(4) defines significant aggravation as "any change for the worse in a pre-existing condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." The legislative history attempts to clarify this definition:

> The Committee has included significant aggravation in the Table in order not to exclude serious cases of illness because of possible minor events in the person's past medical history. This provision does not include compensation for conditions which might legitimately be described as pre-existing (e.g., a child with monthly seizures who, after vaccination, has seizures every three and a half weeks), but is meant to encompass serious

> deterioration (e.g., a child with monthly seizures who, after vaccination, has seizures on a daily basis). The Committee also intends that the time periods set forth in the Table apply to the significant aggravation in order for causation to be deemed to exist (e.g., a significant deterioration of a seizure disorder after [DPT] vaccination must first become manifest within three days of the vaccination).

H.R. Rep. No. 908, 99th Cong., 2d Sess. 15, 16, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6344, 6356-57 [hereinafter "House Report"].

42 U.S.C. § 300aa-13(b)(2) establishes that significant aggravation must occur within three days of administration of a vaccine:

> The special master or court may find the first symptom or manifestation of onset or significant aggravation of any injury, disability, illness, condition, or death described in a petition occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may be made only upon demonstration by a preponderance of the evidence that the onset or significant aggravation of the injury, disability, illness, condition, or death described in the petition did in fact occur within the time period

described in the Vaccine Injury Table.

b. The special master interpreted the language to mean that an award based on a finding of significant aggravation must stem 1) from evidence of aggravation of the disorder within three days following administration of the vaccine[5] and 2) from "a thorough review and analysis of the injured person's condition before and after the vaccination in question, including consideration of what changes could reasonably have been expected in the course of the condition in the absence of any aggravation." *Murphy* slip op. at 3 (citations omitted).

The special master's interpretation is consistent with the plain meaning of the statute. It appears that Congress permitted compensation of injuries that were aggravated significantly by the vaccine so that those with prior injuries would not be excluded. Whether a prior illness or injury was aggravated or a new illness brought on, the illness must have manifested itself within the stipulated time period in order for the child to qualify for compensation.[6] When there are signs of aggravation within the

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5. Petitioners attempt to distort the meaning of the last passage of the legislative history by deleting the final parenthetical phrase of the passage. Petitioners claim that the special master "missed the import of the last part of the quoted passage" by failing to consider "the possibility of significant aggravation outside of 'Table time.'" Pets' Br. filed May 24, 1991, at 12, 13. The deleted language establishes that the significant aggravation must occur within the stipulated time period.

6. On review petitioners ask that the record be reopened to examine evidence that would distinguish between seizures caused by tuberous sclerosis and those that occur as a result of a DPT vaccination. The record shows that Christopher's illness had manifested itself prior to the vaccinations. First, Christopher's head size was exceptionally large immediately after birth, and the doctors discussed with Mrs. Murphy the possibility of neurological problems on two occasions prior to the first vaccination. Second, before the first vaccination was administered, the doctor noted white ash-leaf spots on his chest. Mrs. Murphy averred that these spots had been "very

(Cont'd)

stipulated period, it then must be determined whether those reactions were actually the result of the vaccine or simply a progressive symptom of the prior illness coincidentally arising in that particular period.

4. Findings on proof of Table injury and significant aggravation

Petitioners argue that the special master's denial of a hearing thwarted their proofs. The special master adhered to the standards set forth in the Act. Petitioners filed for compensation claiming that Christopher suffered from encephalopathy and seizures, a Table injury. The Vaccine injury Table sets forth "the time period in which the first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program." 42 U.S.C. § 300aa-14(a).[7] For petitioners to be compensated, they must prove that the

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(Cont'd)

noticeable since about one week and were getting more noticeable all the time." Suppl. Murphy Aff. ¶16. The special master remarked that Christopher's clinical case has been fully consistent with a diagnosis of tuberous sclerosis and found a preponderance of evidence that Christopher's present condition is a natural result of tuberous sclerosis. The record before the special master was adequate to support his finding, to the extent that it was necessary to identify a preexisting condition. Even if the special master erred on this issue, petitioners still failed to prove the requisite significant aggravation within the three-day timeframe.

7. Congress determined the time periods during which manifestations of a reaction to a vaccination must occur in order for a petitioner to be compensated upon a "review of all relevant medical and scientific information" conducted by the Secretary of Health and Human Services. National Commission To Prevent Infant Mortality Act of 1986, Pub. L. No. 99-660, 2133, 100 Stat. 3752, 3779. By linking the relationship between an illness and the vaccination, Congress established "the time periods within which the first symptom or manifestation of onset or aggravation of each such illness or condition can reasonably be determined to occur after pertussis vaccination." 100 Stat. at 3780.

"first symptom or manifestation of onset or of the significant aggravation after vaccine administration" occurred within three days. *Id.*

The special master described a reasonable standard for weighing medical records and personal accounts:

> It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight. *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1947); *Montgomery Coca-Cola Bottling Co. v. United States*, 615 F.2d 1318, 1328 (Ct. Cl. 1980); *see also* 32A C.J.S. *Evidence* §1033 (1964). That rule has been followed in Program cases. *See Flynn v. Secretary of HHS*, No. 89-54V, slip op. at 7 (Cl. Ct. Spec. Mstr. May 17,1990). The rule should not be applied blindly, however. Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a

> fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant. *See Clark v. Secretary of HHS,* No. 9045V, slip op. at 3 (Cl. Ct. Spec. Mstr. March 28, 1991).

Murphy slip op. at 6. As the special master noted, "[t]he medical records in this case are complete and are essentially consistent with one another . . ." *Id.* The medical records identify the onset of Christopher's seizures at three months of age.

The special master reviewed the medical records; they did not indicate that Christopher suffered any reaction to a DPT shot within three days following its administration. Christopher received his first vaccine on October 11, 1976; his second on November 11, 1976; and his third on December 13, 1976. Although the medical records address Christopher's condition, there is no record that his problems manifested themselves within the three-day period. Petitioners do not challenge the special master's findings as to the dates of the vaccinations or those of subsequent hospital visits.

The Act allows petitioners compensation for an injury even if "a symptom or manifestation of . . . [the] illness . . . was not recorded or was incorrectly recorded as having occurred outside such period." 42 U.S.C. § 300aa-13(b)(2). Petitioners must demonstrate, however, "by a preponderance of the evidence that the onset or significant aggravation of the injury, disability, illness, condition, or death described in the petition did in fact occur within the time period described in the Vaccine Injury Table." *Id.* Therefore, even though the medical records do not support petitioners' claim, petitioners may come within the Act's coverage if they demonstrate by a preponderance of the evidence that an injury or manifestation occurred within three days of administration of the vaccine. The

special master ultimately found that "[t]here is no reasonable basis here for implicating the DPT vaccine . . . in Christopher's seizure disorder, his mental retardation or his developmental delays." *Murphy*, slip op. at 10.

The special master determined that the statements submitted by Mrs. Murphy were unsubstantiated. In her March 27, 1991 supplemental affidavit, she describes Christopher's adverse reactions to each of the vaccinations as occurring within a three-day period. Nonetheless, the special master concluded that there was not a preponderance of evidence that these reactions occurred when she averred. Vickie Whaley Bright's affidavit, also dated March 27, 1991, states that "Debbie has always been meticulous in keeping notes and records and journals of events she deemed important ...." Affidavit of Vickie Whaley Bright, Mar. 27, 1991, ¶12. Although Mrs. Murphy's diary recorded "piercing screaming for [an] hour" on October 18, 1976, and the occurrence of a "grand mal seizure" on November 27, 1976, she did not make similar entries regarding any reactions on any of the three dates following each vaccination. As the special master pointed out, Mrs. Murphy completed a questionnaire on April 25, 1983, revealing that Christopher had begun having seizures at the age of 12 weeks and that he had experienced "'no reaction' to any of his DPT shots." *Murphy*, slip op. at 7-8. In addition, none of the affidavits submitted by petitioners, other than Mrs. Murphy's, pinpoints the onset of the seizures as within the critical three-day period. Mrs. Murphy, a licensed practical nurse, did not note in her diary the reactions and timing to which she recently attested, nor did she seek medical treatment for Christopher at the time his reactions allegedly occurred, as she did with the November 27, 1976 seizure.

The special master declined to credit Mrs. Murphy's most recent factual statement. He did not act arbitrarily or capriciously in

doing so. The special master evaluated the evidence of record in tracking Christopher's clinical course, with attention to evidence other than the medical records. His ultimate findings that the evidence did not preponderate that Christopher suffered an encephalopathy or the onset or aggravation of a seizure within three days following any of the DPT vaccinations or that Christopher's present condition could be linked causally to the DPT vaccine administrations were not arbitrary or capricious. The special master's methodical and thorough analysis of the record belies petitioners' contention that a hearing would have developed any more cogent information.[8]

Finally, the court recognizes the underlying principle of the Act as set forth in the House of Representatives Report: "The Federal government has the responsibility to ensure . . . that all

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8. Petitioners criticize the special master for his failure to mention the Occupational Therapy Evaluation, or developmental analysis, performed by occupational therapist Doris J. Shriver, claiming that her report is conclusive evidence of aggravation of Christopher's condition following administration of the vaccine. Pets' Br. filed May 24, 1991, at 10. Ms. Shriver's analysis tracks a series of developmental problems suffered by Christopher following each vaccine administration, but the validity of those findings is questionable. Christopher was born on August 28, 1976. This evaluation was conducted on February 26, 1991. Ms. Shriver based her findings on medical records, photographs, and an interview with Mrs. Murphy. In addition, Ms. Shriver admits that developmental "milestones were generally accomplished" after the first vaccination. Ms. Shriver's report does not maintain that Christopher's problems would not have occurred if the vaccinations had not been administered. She simply relates developmental problems to the dates of the vaccinations. Most significantly, she does not attempt to supply the three-day temporal linkage between vaccination and symptoms, concluding that "the correlation of DPT immunizations to developmental delays [is] obvious in this case." The special master is not required to discuss every item of evidence when his decision reflects that he fully considered a party's position and arguments on point. Even if the special master erred, the error was harmless, given the abundant evidence inconsistent with a finding that administration of the vaccine caused significant aggravation within three days. *See Hines*, No. 91-5027, slip op. at 18-21.

children who are injured by vaccines have access to sufficient compensation for their injuries." House Report at 5, 1986 U.S. Code Cong. & Admin. News at 6346. Congress, however, stipulated the qualifications for compensation under the Act, thereby demarcating those persons deemed injured by vaccines and those persons deemed not injured by vaccines.[9] Sympathy is extended to those parents, such as petitioners, with children suffering grievously, but whom Congress chose to exclude from the Act's coverage. In concluding that petitioners failed to meet their burden of proof, the special master's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

CONCLUSION

Accordingly, based on the foregoing, the decision of the special master is sustained. The Clerk of the Court shall enter judgment accordingly.

No costs on review.

s/ Christine Cook Nettesheim
Christine Cook Nettesheim
Judge

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9. All other arguments made by petitioners that are not discussed specifically have been considered carefully and found to be without merit.

APPENDIX F — DECISION OF UNITED STATES CLAIMS COURT FILED APRIL 25, 1991

In the United States Claims Court

Office of the Special Matters

No. 90-882
(Filed: April 25, 1991)

REXFORD MURPHY AND DEBBIE FIELDS MURPHY, Parents and next friends of CHRISTOPHER CARL MURPHY,

Petitioners,

vs.

SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert Moxley, Cheyenne, Wyoming, for petitioners.

Mary Hampton Mason, U. S. Department of Justice, Washington, D.C., for respondent.

DECISION

BAIRD, Special Master

BACKGROUND

On September 5, 1990, Rexford and Debbie Fields Murphy, as

parents of Christopher Carl Murphy (hereinafter "Christopher"), a minor, filed a petition for compensation under the National Vaccine Injury Compensation Program[1] thereinafter the Program or the Act] for injuries to Christopher which allegedly resulted from a DPT (diphtheria, pertussis, and tetanus) inoculation on October 11, 1976, and were significantly aggravated by subsequent DPT vaccine inoculations on November 11, 1976, December 13, 1976, and March 14, 1978.

Respondent filed a report denying that petitioners are entitled to an award of compensation under the Program and asserting that Christopher's present condition is a result of a congenital disorder, tuberous sclerosis, and that his condition followed a normal course and was not aggravated by any of the subsequent DPT vaccine inoculations.

On April 19, 1991, the court denied petitioners' motion for an evidentiary hearing pursuant to § 12(d) of the Act and Vaccine Rule 8.

THIS STATUTORY SCHEME

Under the Act, there are two separate means of establishing entitlement to compensation. If an injury listed on the Vaccine Injury Table found at § 14(a) of the Act (hereinafter "Table") occurred or was significantly aggravated within the time period prescribed in the Table, then a qualified petitioner is entitled to compensation unless there is a preponderance of evidence that the injury was due to factors unrelated to the administration of the

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1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, *as amended*, 42 U.S.C.A. § 300aa-1 *et seq.* (West Supp. 1990), *as amend- ed by* the Vaccine and Immunization Amendments of 1990, Pub. L. No 101-502 (1990).

vaccine. Compensation may also be awarded for injuries not listed on the Table or which are listed but occurred outside the time limits of the Table, but entitlement in such cases is dependent upon proof by a preponderance of evidence that the vaccine actually caused the injury complained of. In either case, the residual effects must have persisted for at least six months, and unreimbursable expenses in excess of $1,000 must have been incurred as a result of the injury.

Petitioners have pursued their claim as a Table case. The petition alleged that Christopher suffered an encephalopathy and the onset of a seizure disorder within three days following the administration of the DPT vaccine. Both "encephalopathy (or encephalitis)" and "residual seizure disorder" are Table-listed injuries for the DPT vaccine if the first symptom or manifestation of onset thereof appeared within three days following vaccination. Additional requirements for a residual seizure disorder are set out in § 14(b)(2) of the Act: The petitioner must not have suffered a seizure or convulsion unaccompanied by fever or accompanied by a fever of less than 102° before the first seizure or convulsion following the administration of the vaccine and, within one year after the administration of the vaccine, two or more seizures or convulsions unaccompanied by fever or accompanied by a fever of less than 102° must have occurred.

The petition also alleged that Christopher's condition was significantly aggravated by subsequent administrations of the DPT vaccine. The term "significant aggravation" is defined in § 33(4) of the Act as "any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." The concept of significant aggravation is discussed in the legislative history as follows:

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> The committee has included significant aggravation in the Table in order not to exclude serious cases of illness because of possible minor events in the person's past medical history. This provision does not include compensation for conditions which might legitimately be described as pre-existing (e.g., a child with monthly seizures who, after vaccination, has seizures every three and a half weeks), but is meant to encompass serious deterioration (e.g., a child with monthly seizures who, after vaccination, has seizures on a daily basis). The Committee also intends that the time periods set forth in the Table apply to the significant aggravation in order for causation to be deemed to exist (e.g., a significant deterioration of a seizure disorder after DPT vaccination must first become manifest within three days of the vaccination).

H. R. Rep. 908, 99th Cong., 2nd Sess. Pt. 1 at 15-16, *reprinted in* U.S. Code Cong. & Admin. News 6344, 6356-57.

The court interprets the statutory and committee language to mean: (1) that in order to grant an award based on a finding of significant aggravation of a seizure disorder under the Table, the court must find that there was evidence of aggravation of the disorder within three days following the administration of the vaccine, and (2) that a determination that a change in condition constituted a significant aggravation must be based on a thorough review and analysis of the injured person's condition before and after the vaccination in question, including consideration of what changes could reasonably have been expected in the course of the

condition in the absence of any aggravation. *See Misasi v. Secretary of HHS*, No. 90-400V slip op. at 5 (Cl. Ct. Spec. Mstr. March 4, 1991); *First Commercial Bank v. Secretary of HHS*, No. 90-537V, slip op. at 4 (Cl. Ct. Spec. Mstr. Feb. 25, 1991).

If the court finds that there was a significant aggravation and that the first symptoms or manifestations occurred within three days following the vaccination, then the petitioner is entitled to an award unless there is a preponderance of evidence that the aggravation was due to factors unrelated to the administration of the vaccine. The court may also find a non-Table significant aggravation under § 11(c)(1)(C)(ii) of the Act, but the burden is on a petitioner to prove actual causation of such an aggravation by a preponderance of evidence.

PETITIONERS' CLAIMS

The petitioners claim that within eight hours of his first DPT shot, Christopher displayed symptoms of an encephalopathy — unusual high-pitched screaming of hours' duration and periods where he would go completely limp for a few seconds — and of the onset of a seizure disorder in the form of infantile spasms. They claim that they notified "the pediatricians" by telephone of these symptoms, but that they were brushed off as being insignificant.[2] They also claim an immediate dramatic worsening of both the screaming and infantile spasms following the second DPT shot. Mrs. Murphy claims that within eight hours after the third DPT shot, Christopher "showed a return of his seizures, worse than before."[3] She claims, further, that following the 1978 shot "[b]y nightfall, his seizures had dramatically increased. He was having a high pitched screaming spell of hours [sic] duration again and ran a high fever that night and the next day."[4]

2. Supplemental affidavit of Mrs. Murphy, ¶ 8.

3. *Id.* at ¶ 16.

4. *id.* at ¶27.

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A friend of the family, Vickie Whaley Bright, testified by affidavit:

> Right after his first DPT shot, Debbie told me that the Doctor had commented on Chris's two white spots on his chest and said they might be the symptom of a rare disease, but not to worry yet.... She also told me that Chris had begun to have screaming spells, was extremely irritable crying for hours on end and having jerking spells. I vividly remember her describing the spells in which his arms would fly up and his legs out and a tear would run down his cheek. I witnessed these spells at some point during this time, but cannot pinpoint in my memory now when I first saw one, however I am certain that I must have....[5]

A neighbor, Geraldine Brown, also testified by affidavit. She refers to a "high-pitched shrill scream" having occurred in her presence "[s]everal days before Christopher's very first emergency room visit." She states that Christopher "became very restless and for the next several days he had a varied display of actions —jerky, spastic movements; periods of staring and a blank look" and another period of high-pitched screaming.[6] However, she also states that prior to his first hospitalization for seizures, Christopher "was alert, bright-eyed, and doing very well, with the normal development expected of an infant.[7] Further, she does not know the dates of Christopher's childhood vaccinations.

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5. Affidavit of Vickie Whaley Bright filed March 29, 1991, ¶5.

6. Geraldine Brown affidavit, ¶5.

7. *Id.* at ¶4.

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MEDICAL RECORDS

The medical records provided are extensive and, for all practical purposes, complete. There is nothing in them which indicates that there was an adverse reaction to any of the DPT vaccinations. Nor do they contain information which tends to establish a temporal relationship between any of the vaccinations and any compensable adverse reaction. Indeed, the medical records provide evidence which contradicts the fact testimony concerning the timing of the onset of seizure activity in Christopher. They provide no support for an award.

STANDARD FOR WEIGHING THE EVIDENCE

Because the claims of the petitioners are not supported by the medical records, the court must consider carefully the comparative weight to be given to the fact testimony and the medical records. Section 13(a)(1) of the Act provides that the court may not make a finding of entitlement to compensation "based on the claims of a petitioner alone, unsubstantiated by medical records or medical opinion." In this case the medical records do not substantiate the claims of the petitioner. To the extent that it interprets the events described by the fact witnesses to have occurred following the vaccinations as constituting compensable injuries, the medical opinion testimony offered by the petitioners does support their claims; but to the extent that it relies on the testimony of the petitioners' witnesses as to the occurrence and timing of events, it must stand or fall with the fact testimony. The petitioners' opinion testimony does not provide an independent basis for a finding of entitlement to compensation.

This does not preclude a finding in favor of the petitioner. Section 13(b)(2) of the Act allows the court to

> find the first symptom or manifestation of onset or significant aggravation of an injury, . . . occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may be made only upon demonstration by a preponderance of the evidence that the onset . . . did in fact occur within the time period described in the Vaccine Injury Table.

Section 13(b)(2) expressly authorizes the court to make findings as to when a petitioner's injuries were first manifested without regard to the medical records. This court could, consistent with the wording of the Act, find entitlement to an award in this case, notwithstanding the evidence in the medical records that the first seizure occurred on November 27.

How, then, should the evidence be weighed? Case law provides some guidance. It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight. *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1947); *Montgomery Coca-Cola Bottlina Co. v. United States*, 615 F.2d 1318, 1328 (Ct. Cl. 1980); *see also* 32A C.J.S. *Evidence* § 1033 (1964). That rule has been followed in Program cases. *See, e.a., Flynn v. Secretary of HHS*, No. 89-54V, slip op. at 7 (Cl. Ct. Spec. Mstr. May 17, 1990). The rule should not be applied blindly, however. Written records which are, themselves, inconsistent, should be accorded less deference than thosewhich are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who

later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant. *See Clark v. Secretary of HHS*, No. 90-45V, slip. op. at 3 (Cl. Ct. Spec. Mstr. March 28, 1991).

The medical records in this case are complete and are essentially consistent with one another. They are not silent on the question of when the onset of seizures occurred: They all state that seizures commenced at about three months of age.

ANALYSIS OF THE EVIDENCE — CHRISTOPHER'S CLINICAL COURSE

Weighing the evidence according to the standard set out hereinabove, the preponderance of the evidence is that Christopher's clinical course was as follows: Christopher was born to petitioners on August 28, 1976, in Greenville, North Carolina. Mrs. Murphy's pregnancy was complicated by vaginal bleeding during the sixth month and the onset of premature labor. Contractions were controlled with intravenous valium and she was confined to bed for the duration of her term. Christopher weighed 8 lbs. 5 oz. at birth and had Apgar scores of 9 and 10. His head size at birth was 36 cm., which is near the 85th percentile for newborn males.[8] Christopher appeared healthy at birth but was born with

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8. The mean head size for newborn males is 34.8 cm. The 90th percentile size is 36.6 cm. *NCHS Growth Curves for Children*, DHEW Pub. No. (PHS) 78-1650, published in Vital and Health Statistics —Series 11 — No. 165 (1977), Table 11 at 35.

tuberous sclerosis, a congenital disease. He was discharged from the hospital on August 31, 1976.

Christopher was taken to his pediatrician for a well baby checkup on September 16, 1976. His doctor noted that his head size was 39 cm., a reading at the 97th percentile. He also noted that Christopher's right ear was larger than his left ear. He asked that Christopher be brought back for another head measurement in two weeks.

By October 11, 1976, Christopher's head size had grown to 41 cm., which is abnormally large.[9] Notes taken by his doctor on that date indicate that he had questionable right torticollis. According to Mrs. Murphy, the doctor suggested that Christopher might be suffering from hydrocephalus or another neurological problem. He also told her that two white ash leaf shaped spots on Christopher's chest could be a sign of a very rare disease. Christopher was given his first dose of DPT vaccine on October 11.

At 9:50 p.m. on October 18, 1976, Christopher was taken to the emergency room at Pitt County Memorial Hospital (Pitt) with a complaint that he had cried from 3:00 p.m. to 6:00 p.m. and that commencing at 8:00 p.m., he had screamed and cried with a high-pitched shrill cry for about an hour. A physical exam performed at the hospital showed him to be within normal limits. The doctor did not make a specific diagnosis, but indicated that he suspected gas pains.

There is no credible evidence in the record to support the claim

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9. Any head size which is more than two standard deviations above or below the median — above the 97.5 percentile or below the 2.5 percentile — is considered abnormal.

that Christopher had a compensable reaction to his initial DPT shot. The hospital records of October 18 indicate that the high-pitched cry began that day. Mrs. Murphy's own hand-recorded notes of Christopher's medical history have no entries between September 16, 1976, and October 18, 1976. The October 18 entry refers to "piercing screaming for hour"[10] and makes no reference to any earlier screaming, limpness or seizuring. On April 25, 1983, Mrs. Murphy completed — in her own handwriting — an extensive, 19-page questionnaire concerning Christopher. In that questionnaire, she indicated that he began having seizures at the age of 12 weeks[11] and that he had "no reaction" to any of his DPT shots.[12] Having denied any adverse reactions to the DPT vaccinations at that time, her present claim that there were adverse reactions rings hollow.

The testimony of the affiants is too indefinite as to timing to support the finding of a Table-injury following the first DPT shot. As to the testimony of Ms. Brown, Christopher's first hospitalization for seizures was not until November 27, so the court is unable to reconcile her testimony about Christopher's condition preceding his first hospitalization for seizures with her testimony about his condition before his first visit to the emergency room, which was in October. Further, the court is unable to accept that the events described by the affiants could have occurred yet not been referred to at some point in the medical records in the weeks and months following. Mrs. Murphy is a licensed practical nurse. The court is persuaded that if these events had occurred as described, she would have noted them in her diary[13] and would have sought out

10. Attachment I to supplemental affidavit at 2.

11. Medical records at 296.

12. *Id.* at 307.

13. Ms. Bright states that Mrs. Murphy "has always been meticulous in keeping notes and records and journals of events she deemed important and also kept records on her calendars." Affidavit of Vickie Whaley Bright, q 2.

medical treatment, just as she did following the November seizure. Further, when the November seizure occurred, she would not have referred to it as though it were Christopher's first seizure.

Therefore, the claim that symptoms of Table injuries were first manifested within eight hours following the vaccination is not considered credible. The October 18 episode was a full week after the vaccination — and four days beyond the Table period for encephalopathy. Moreover, it is not sufficient evidence upon which to base a finding that an encephalopathy occurred. § 14(b)(3)(A). So, that episode does not establish the occurrence of a compensable injury.

On November 11, 1976, Christopher was given his second dose of DPT vaccine. The doctor noted that he was less irritable. His head size was 43 cm., well beyond the 97th percentile. As with the first shot there is no credible evidence of any compensable injury following the second administration of the DPT vaccine. Neither prong of the two-part statutory test for significant aggravation has been established. There is not a preponderance of evidence that Christopher experienced markedly greater disability, pain or illness following that shot; even if there were such evidence, there is no evidence of a substantial deterioration of his health in temporal relationship to that vaccination. The November 27 seizure was too long after the vaccination even to permit conjecture that it was caused by the vaccination.

On November 27, 1976, Christopher suffered his first documented seizure while he was being fed dinner by his mother. His eyes rolled back and he became tonic and unresponsive for about one minute. He was taken to Pitt, where he had another generalized tonic seizure. He was admitted to the hospital for evaluation. According to the hospital records, Christopher's

mother said: "We need to find out why Christopher had a seizure."[14] There is no suggestion in the hospital records that Christopher had had prior seizures. His past history was listed as "essentially benign" except for his large head.[15] An EEG performed during the hospitalization showed an abnormal pattern consistent with a seizure disorder. Christopher was discharged on December 1 with a diagnosis of seizure disorder.

On December 13, 1976, Christopher was given his third dose of DPT vaccine. His head size was even more abnormal at 44.5 cm. The doctor noted that he was doing well and that he had had no seizures. Christopher was being given phenobarbital twice a day. Despite petitioners' claims that he had a return of seizures within eight hours following this vaccination, the preponderance of evidence is that Christopher had no seizures after his first seizures on November 27, 1976, until January 13, 1977.

Christopher's next recorded seizures were on January 13, 1977. He had three seizures on that date and was admitted to Pitt for one night. He was afebrile on admission. No cause for the seizures was found. The hospital records note that Christopher had had a seizure disorder since he was 3 1/2 months old. Dilantin was added as an anti-seizure medication.

After this, the frequency of Christopher's seizures increased. On February 2, he was noted by his doctor to be having more than 15 seizures per week, five of which lasted for more than one minute. Clonopin was added to his drug regimen. On February 23, at Christopher's six-month checkup, it was noted that he had been

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14. Medical records at 70.

15. *Id.* at 42.

seizure free for three days. However, on February 26, his doctor observed what he described as "typical 'massive spasms.' "[16]

On March 19, 1977, the doctor noted that Christopher was having massive spasms four to five times per day. He was put on ACTH. This resulted in a marked improvement in his condition. His seizures stopped and he became more alert and more active. However, the ACTH therapy was halved in late April and discontinued in June. This resulted in increased seizure activity.

By July 1977, Christopher had multiple white spots on his body. He was having frequent seizures and periods of extreme irritability. By September, he was noted by his doctor to have screaming spells. Thereafter, his seizures varied in frequency. On December 9, 1977, Christopher was seen by F. E. Dreifuss, M.D., a neurologist associated with the University of Virginia Medical Center (Virginia). Dr. Dreifuss noted that at no time had Christopher regressed from previously obtained milestones and that he had continued to make progress, although at a rate slower than normal. Dr. Dreifuss did not make a specific diagnosis, but suspected that Christopher was a child "who has a left infantile hemiparesis and whose seizures are on the basis of a structural neurological deficit."[17]

The fourth dose of DPT vaccine was administered to Christopher on March 14, 1978. At that time, he was having one to ten seizures per day. Although significant aggravation was alleged with respect to this inoculation, that allegation finds no support in the record. Mrs. Murphy recorded the number of seizures

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16. *Id.* at 20A. In subsequent correspondence, the doctor explained that he meant seizures typical of infantile massive spasms. *Id.* at 226.

17. *Id.* at 229.

Christopher had each day. Those records show that there was no significant change in seizure activity on March 14 or the days following. The first substantial increase in seizure activity occurred on March 24. On March 30, Christopher was again admitted to Pitt, to do a workup on his seizure disorder and to try to improve his seizure control. He was discharged on April 4 with a final diagnosis of tuberous sclerosis. The nursing discharge summary noted that during the period of hospitalization, seizure frequency had been reduced from 30 per day to eight to 14 per day. The diagnosis of tuberous sclerosis was confirmed at Virginia the following week.

At the present time, Christopher is severely to profoundly mentally retarded and has both fine and gross motor skill delays. He has been seizure free since 1985. His clinical course throughout his life has been fully consistent with what might reasonably be expected of a child born with tuberous sclerosis. A large majority of such children experience seizure disorders of the type experienced by Christopher as well as mental retardation. There is nothing in this case which stands out as out of the ordinary. There was never any developmental regression in temporal relationship to the DPT vaccinations. There is no reasonable basis here for implicating the DPT vaccine — either by way of the Table or by way of causation-in-fact — in Christopher's seizure disorder, his mental retardation or his developmental delays.

Appendix F

FINDINGS OF FACT

1. Christopher received DPT vaccine inoculations on October 11, 1976, November 11, 1976, December 13, 1976, and March 14, 1978, in Greenville, North Carolina.

2. In March 1978, Christopher was diagnosed as having tuberous sclerosis.

3. There is not a preponderance of evidence that Christopher suffered an encephalopathy or the onset or aggravation of a seizure disorder within 72 hours following any of the DPT vaccine administrations.

4. There is not a preponderance of the evidence linking Christopher's present condition causally to any or all of the DPT vaccine administrations.

5. There is a preponderance of evidence that Christopher's present condition is a natural result of his tuberous sclerosis.

CONCLUSION OF LAW

Petitioners are not entitled to an award of compensation under the Program.

In the absence of a motion for review filed pursuant to RUSCC Appendix J, the clerk of the court is directed to enter judgment in accordance herewith.

s/ Paul T. Baird
Paul T. Baird
Special Master

APPENDIX G - ORDER OF THE UNITED STATES CLAIMS COURT FILED APRIL 19, 1991

In the United States Claims Court

No. 90-882V
Office of the Special Masters
(Filed: April 19, 1991)

REXFORD MURPHY AND DEBBIE FIELDS MURPHY, PARENTS AND NEXT FRIENDS OF CHRISTOPHER CARL MURPHY,

Petitioners,

vs.

SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES,

Respondent.

ORDER[1]

On March 29, 1991, petitioners filed a motion seeking an evidentiary hearing in the above-entitled matter. Accompanying the motion was a supporting memorandum of law. The respondent filed a reply brief urging that the motion for an evidentiary hearing be denied. Petitioners' motion was undoubtedly prompted by the court's indication at the status conference held on March 11, 1991, that the court did not feel that a hearing was necessary to resolve the issues in this case.

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1. This substantive order will be made available as a public document unless petitioner;seeks to delete particular information within 14 days pursuant to Vaccine Rule 18(b).

Appendix G

The authority and responsibility of the court with respect to the conduct of hearings is set out in 42 U.S.C. § 300aa-12(d)(3)(B)(v) which provides that "[i]n conducting a proceeding on a petition a special master — . . . may conduct such hearings as may be reasonable and necessary." This statutory language was amended in December 1989. Previously, special masters were authorized to "conduct such hearings as may be appropriate." 42 U.S.C. § 300aa-12(c)(2)(D), *as amended by* Pub.L. 100-360, § 4308(a)(3), 102 Stat. 808 (July 1, 1988). In the same legislation, Congress directed this court to promulgate rules to provide for "a less-adversarial, expeditious, and informal proceeding for the resolution of petitions," including "the opportunity for parties to submit arguments and evidence on the record without requiring routine use of oral presentations, cross examinations, or hearings . . . ." 42 U.S.C. § 300aa-12(d)(2)(A) and (C).

It is clear from the legislative history that Congress was concerned that vaccine compensation proceedings had become over-judicialized and were being handled too much like ordinary litigation. The conference committee report accompanying the 1989 amendments stated that "the Conferees reiterate their intent that the vaccine injury compensation system be informal, flexible, and expeditious, and that all participants proceed accordingly." The report went on to state that "[t]he Conferees also reiterate their expectation that the Special Master and the powers given to the Master will allow the proceedings to be direct and straightforward. The Master should be able to require from petitioners and respondents information sufficient to evaluate the petition without resort to complex proceedings." H.R. Rep. No. 386, 101 Cong., 1st Sess. 513, *reprinted in* 1989 U.S. Code Cong. & Admin. News 3116.

In response to the 1989 statutory amendments discussed

hereinabove, this court, on January 18, 1990, promulgated revised procedural rules for vaccine cases. Vaccine Rule 5 provides that a status conference shall be held within 30 days following the filing of the respondent's report and that at that conference the special master will "orally present tentative findings and conclusions." Further, Vaccine Rule 8(d) provides that a "special master may decide a case on the basis of written filings without an evidentiary hearing."[2] Vaccine Rule 8(e) provides that an evidentiary hearing may be conducted "[w]hen necessary." If there is a bias under the law, it is against, not in favor of, the conduct of evidentiary hearings on vaccine petitions.

In a case in which the claim is fully developed in the written record and the special master sees no need to observe the fact witnesses personally for the purpose of assessing credibility, there is no justification for holding an evidentiary hearing, notwithstanding the desires of one or both of the parties.[3] That is the case here. The record comprises a detailed, 15-page factual affidavit of the mother as well as affidavits from the father and other fact witnesses; the mother's diary, calendar, and other notes; complete medical records; and reports and curriculum vitaes from expert medical witnesses for each of the parties. The record as it now stands is more than sufficient to enable the special master to reach a fair, reasoned, and informed decision on the petition. After

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2. Vaccine Rule 8(d) also allows a special master to decide a case on summary judgment, but a case need not meet the summary judgment criteria to be decided on the written filings. This case is being decided on the written filings based on the authority of the first sentence of the rule, not the second.

3. With some 4,000 petitions pending and severe time constraints in effect for deciding them, holding an unnecessary hearing does more than just waste time and money. It seriously prejudices the other petitioners waiting in line.

thoroughly reviewing the written record, the court is persuaded that there is nothing which could be testified to at an evidentiary hearing which would affect the outcome of the case.

Therefore, the motion for an evidentiary hearing is DENIED.

In his brief in reply to the motion for an evidentiary hearing, respondent moved to strike certain affidavits which were filed on March 29, 1991. Although the affidavits were beyond the scope of the court's order issued March 11, 1991, they will not be stricken from the record. If an evidentiary hearing had been held, it is reasonable to assume that those affiants would have testified on behalf of the petitioners. Therefore, the motion to strike is DENIED.

The case will be considered submitted on the present record and a decision will be issued on or before May 3, 1991.

s/ Paul T. Baird
Paul T. Baird
Special Master

APPENDIX H – FIFTH AMENDMENT

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I – STATUTORY PROVISION OF VACCINE ACT ESTABLISHING JURISDICTION OF COURTS AND SPECIAL MASTERS

§ 300aa-12. Court jurisdiction

(a) General rule. the United States Claims Court and the United States Claims Court special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under section 2111 [42 USCS § 300aa-11] is entitled to compensation under the Program and the amount of such compensation. The United States Claims Court may issue and enforce such orders as the court deems necessary to assure the prompt payment of any compensation awarded

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(b) Parties. (1) In all proceedings brought by the filing of a petition under section 2111(b) [42 USCS § 300aa-11(b)], the Secretary shall be named as the respondent, shall participate, and shall be represented in accordance with section 518(a) of title 28, United States Code.

(2) Within 30 days after the Secretary receives service of any petition filed under section 2111 [42 USCS § 300aa-11] the Secretary shall publish notice of such petition in the Federal Register. The special master designated with respect to such petition under subsection (c) shall afford all interested persons an opportunity to submit relevant, written information–

> (A) relating to the esistence of the evidence described in section 2113(a)(1)(B) [42 USCS §300aa-13(a)(1)(B)], or (B) relating to any allegation in a petition with respect to the matters described in section 2111(c)(1)(C)(ii) [42 USCS § 300aa-11(c)(1)(C)(ii)].

(c) United State Claims Court special masters. (1) There is established within the United States Claims Court an office of

special masters which shall consist of not more than 8 special masters. The judges of the United States Claims Court shall appoint the special masters, 1 of whom, by designation of the judges of the United States Claims Court, shall serve as chief special master. The appointment and reappointment of the special masters shall be by the concurrence of a majority of the judges of the court.

(2) The chief special master and other special masters shall be subject to removal by the judges of the United States Claims Court for incompetency, misconduct, or neglect of duty or for physical or mental disability or for other good cause shown.

(3) A special master's office shall be terminated if the judges of the United States Claims Court determine, upon advice of the chief special master, that the services performed by that office are no longer needed.

(4)The appointment of any individual as a special master shall be for a term of 4 years, subject to termination under paragraphs (2) and (3).

Individuals serving as special masters upon the date of the enactment of this subsection [enacted Dec. 19, 1989] shall serve for 4 years from the date of their original appointment, subject to termination under paragraphs (2) and (3). The chief special master in office on the date of the enactment of this subsection [enacted Dec. 19, 1989] shall continue to serve as chief special master for the balance of the master's term, subject to termination under paragraphs (2) and (3).

(5) The compensation of the special masters shall be determined by the judges of the United States Claims Court, upon advice of the chief special master. The salary of the chief special master shall be

the annual rate of basic pay for level IV of the Executive Schedule, as prescribed by section 5315, title 5, United States Code. The salaries of the other special masters shall not exceed the annual rate of basic pay level V of the Executive Schedule, as prescribed by section 5316, title 5, United States Code.

(6) The chief special master shall be responsible for the following:

(A) Administering the office of special masters and their staff, providing for the efficient, expeditious, and effective handling of petitions, and performing such other duties related to the Program as may be assigned to the chief special master by a concurrence of a majority of the United States Claims Courts judges.

(B) Appointing and fixing the salary and duties of such administrative staff as are necessary. Such staff shall be subject to removal for good cause by the chief special master.

(C) Managing and executing all aspects of budgetary and administrative affairs affecting the special masters and their staff, subject to the rules and regulations of the Judicial Conference of the United States. The Conference rules and regulations pertaining to United States magistrates shall be applied to the special masters.

(D) Coordinating with the United States Claims Court the use of services, equipment, personnel, information, and facilities of the United States Claims Court without reimbursement.

(E) Reporting annually to the Congress and the judges of the United States Claims Court on the number of petitions

filed under section 2111 [42 USCS § 300aa-11] and their disposition, the dates on which the vaccine-related injuries and deaths for which the petitions were filed occurred, the types and amounts of awards, the length of time for the disposition of petitions, the cost of administering the Program, and recommendations for changes in the Program.

(d) **Special masters.** (1) Following the receipt and filing of a petition under section 2111 [42 USCS § 300aa-11], the clerk of the United States Claims Court shall forward the petition to the chief special master who shall designate a special master to carry out the functions authorized by paragraph (3).

(2) The special masters shall recommend rules to the Claims Court and, taking into account such recommended rules, the Claims Court shall promulgate rules pursuant to section 2071 of title 28, United States Code. Such rules shall–

(A) provide for a less adversarial, expeditious, and informal proceeding for the resolution of petitions,

(B) include flexible and informal standards of admissibility of evidence,

(C) include the opportunity for summary judgment,

(D) Include the opportunity for parties to submit arguments and evidence on the record without requiring routine use of oral presentations, cross examinations, or hearings, and

(E) provide for limitations on discovery and allow the special masters to replace the usual rules of discovery in civil actions in the United States Claims Court.

Appendix I

(3)(A) A special master to whom a petition has been assigned shall issue a decision on such petition with respect to whether compensation is to be provided under the Program and the amount of such compensation. The decison of the special master shall–

(i) include findings of fact and conclusions of law, and

(ii) be issued as expeditiously as practicable but not later than 240 days, exclusive of suspended time under subparagraph (C), after the date the petition was filed.

The decision of the special master may be reviewed by the United States Claims Court in accordance with subsection (e).

(B) In conducting a proceeding on a petition a special master–

(i) may require such evidence as may be reasonable and necessary,

(ii) may require the submission of such information as may be reasonable and necessary,

(iii) may require the testimony of any person and the production of any documents as may be reasonable and necessary,

(iv) shall afford all interested persons an opportunity to submit relevant written information

(I) relating to the existence of the evidence described in section 2113(a)(1)(B) [42 USCS §300aa-13(a)(1)(B)], or

(II) relating to any allegation in a petition with

respect to the matters described in section 2111(c)(1)(C)(ii) [42 USCS § 300aa-11(c)(1)(C)(ii)], and

(v) may conduct such hearings as may be reasonable and necessary.

There may be no discovery in a proceeding on a petition other than the discovery required by the special master.

(C) In conducting a proceeding on a petition a special master shall suspend the proceedings one time for 30 days on the motion of either party. After a motion for suspension is granted, further motions for suspension by either party may be granted by the special master, if the special master determines the suspension is reasonable and necessary, for an aggregate period not to exceed 150 days.

(D) If, in reviewing proceedings on petitions for vaccine-related injuries or deaths associated with the administration of vaccines before the effective date of this part, the chief special master determines that the number of filings and resultant workload place an undue burden on the parties or the special master involved in such proceedings, the chief special master may, in the interest of justice, suspend proceedings on any petition for up to 180 days in addition to the suspension time under subparagraph (C).

(4)(A) Except as provided in subparagraph (B), information submitted to a special master or the court in a proceeding on a petition may not be disclosed to a person who is not a party to the proceeding without the express written consent of the person who submitted the information.

(B) A decision of a special master or the court in a proceeding shall

be disclosed, except that if the decision is to include information–

> (i) which is trade secret or commercial or financial information which is privileged and confidential, or
>
> (ii) which are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy,

and if the person who submitted such information objects to the inclusion of such information in the decision, the decision shall be disclosed without such information.

(e) Action by the United States Claims Court. (1) Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Claims Court a motion to have the court review the decision. If such a motion is filed, the other party shall file a response with the clerk of the United States Claims Court no later than 30 days after the filing of such motion.

(2) Upon the filing of a motion under paragraph (1) with respect to a petition, the United States Claims Court shall have jurisdiction to undertake a review of the record of the proceedings and may thereafter–

> (A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,
>
> (B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of

law, or

(C) remand the petition to the special master for further action in accordance with the court's direction.

The court shall complete its action on a petition within 120 days of the filing of a response under paragraph (1) excluding any days the petition is before a special master as a result of a remand under subparagraph (C). The court may allow not more than 90 days for remands under subparagraph (C).

(3) In the absence of a motion under paragraph (1) respecting the special master's decision or if the United States Claims Court takes the action described in paragraph (2)(A) with respect to the special master's decision, the clerk of the United States Claims Court shall immediately enter judgment in accordance with the special master's decision.

(f) Appeals. The findings of fact and conclusions of law of the United States Claims Court on a petition shall be final determinations of the matters involved, except that the Secretary or any petitioner aggrieved by the findings or conclusions of the court may obtain review of the judgment of the court in the United States court of appeals for the Federal Circuit upon petition filed within 60 days of the date of the judgment with such court of appeals within 60 days of the date of entry of the United States Claims Court's judgment with such court of appeals.

(g) Notice. If–

(1) a special master fails to make a decision on a petition within the 240 days prescribed by subsection

(d)(3)(A)(ii) (excluding (A) any period of suspension under subsection (d)(3)(C) or (d)(3)(D), and (B) any days the petition is before a special master as a result of a remand under subsection (e)(2)(C)), or

(2) the United States Claims Court fails to enter a judgment under this section on a petition within 420 days (excluding (A) any period of suspension under subsection (d)(3)(C) or (d)(3)(D), and (B) any days the petition is before a special master as a result of a remand under subsection (e)(2)(C)) after the date on which the petition was filed,

the special master or court shall notify the petitioner under such petition that the petitioner may withdraw the petition under section 2121(b) [42 USCS § 300aa-21(b)] and the petition will be considered withdrawn under such section if the petitioner, the special master, or the court do not take certain actions.

APPENDIX J –STATUTORY PROVISION OF VACCINE ACT SETTING FOR STANDARDS FOR ELIGIBILITY AND COMPENSATION

§300aa-13. Determination of eligibility and compensation.

(a) General rule. (1) Compensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole–

> (A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 2111(c)(1) [42 USCS § 300aa-11(c)(1)], and
>
> (B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

The special master or court may not make such a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.

(2) For purposes of paragraph (1), the term "factors unrelated to the administration of the vaccine"–

> (A) does not include any idiopathic, unexplained, unknown, hypothetical, or undocumentable cause, factor, injury, illness, or condition, and (B) may, as documented by the petitioner's evidence or other material in the record, include infection, toxins, trauma (including birth trauma and related anoxia), or metabolic disturbances which have no known relation to the vaccine involved, but which in the particular case are shown to have been the agent or agents principally responsible for

causing the petitioner's illness, disability, injury, condition, or death.

(b) Matters to be considered. (1) In determining whether to award compensation to a petitioner under the Program, the special master or court shall consider, in addition to all other relevant medical and scientific evidence contained in the record–

(A) any diagnosis, conclusion, medical judgment, or autopsy or coroner's report which is contained in the record regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death, and

(B) the results of any diagnostic or evaluative test which are contained in the record and the summaries and conclusions.

Any such diagnosis, conclusion, judgment, test result, report, or summary shall not be binding on the court. In evaluating the weight to be afforded to any such diagnosis, conclusion, judgment, test result, report, or summary, the special master or court shall consider the entire record and the course of the injury, disability, illness, or condition until the date of the judgment of the special master or court.

(2) The special master or court may find the first symptom or manifestation of onset or significant aggravation of an injury, disability, illness, condition, or death described in a petition occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may be made only upon demonstration by a preponderance of the evidence that

the onset or significant aggravation of the injury, disability, illness, condition, or death described in the petition did in fact occur within the time period described in the Vaccine Injury Table.

(c) **"Record" defined**. For purposes of this section, the term "record" means the record established by the special masters of the United States Claims Court in a proceeding on a petition filed under section 2111[42 USCS § 300aa-11].

APPENDIX K – EXCERPT OF STATUTORY PROVISION OF VACCINE ACT, THE VACCINE INJURY TABLE

§ 300aa-14. Vaccine Injury Table

(a) Initial table. The following is a table of vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration of such vaccines, and the time period in which the first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program:

VACCINE INJURY TABLE

I. DTP; P; DTP/Polio Combination; or Any Other Vaccine Containing Whole Cell Pertussis Bacteria Extracted or Partial Cell Bacteria, or Specific Pertussis Antigen(s). Illness, disability, injury, or condition covered:	Time period for first symptom or manifestation of onset or of significant aggravation after vaccine administration:
A. Anaphylaxis or anaphylactic shock	24 hours
B. Encephalopathy (or encephalitis)	3 days
C. Shock-collapse or hypotonic-hyporesponsive collapse.	3 days

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D. Residual seizure disorder in accordance with subsection (b)(2).	3 days
E. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose within the time period prescribed.	Not applicable
II. Measles, mumps, rubella, or any vaccine containing any of the foregoing as a component; DT; Td; or Tetanus Toxoid.	
A. Anaphylaxis or anaphylactic shock.	24 hours
B. Encephalopathy (or encephalitis).	15 days (for mumps, rubella, measles, or any vaccine containing any of the foregoing as a component). 3 days (for DT, Td, or tetanus toxoid).

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C. Residual seizure disorder in accordance with subsection (b)(2).....	15 days (for mumps, rubella, measles, or any vaccine containing any of the foregoing as a component). 3 days (for DT, Td, or tetanus Toxoid).
D. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose within the time period prescribed.....	Not applicable
III. Polio Vaccines (other than Inactivated Polio Vaccine).	
A. Paralytic polio	
–in a non-immunodeficient recipient.....	30 days
–in an immunodeficient recipient.....	6 months
–in a vaccine-associated community case.....	Not applicable
B. Any acute complication or sequela (including death) of an	

illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose within the time period prescribed.....	Not applicable

IV. Inactivated Polio Vaccine.

A. anaphylaxis or anaphylactic shock	24 hours
B. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illnes, disability, injury, or condition arose within the time period prescribed.....	Not applicable

(b) Qualifications and aids to interpretation. The following qualifications and aids to interpretation shall apply to the Vaccine Injury Table in subsection (a):

(1) A shock-collapse or a hypotonic-hyporesponsive collapse may be evidenced by indicia or symptoms such as decrease or loss of muscle tone, paralysis (partial or complete), hemiplegia or hemiparesis, loss of color or turning pale white or blue, unresponsiveness to environmental stimuli, depression of consciousness, loss of consciousness, prolonged sleeping with

difficulty arousing, or cardiovascular or respiratory arrest.

(2) A petitioner may be considered to have suffered a residual seizure disorder if the petitioner did not suffer a seizure or convulsion unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit before the first seizure or convulsion after the administration of the vaccine involved and if–

(A) in the case of a measles, mumps, or rubella vaccine or any combinatin of such vaccines, the first seizure or convulsion occurred within 15 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit, and

(B) in the case of any other vaccine, the first seizure or convulsion occurred within 3 days after administration or the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit.

(3)(A) The term "encephalopathy" means any significant acquired abnormality of, or injury to, or impairment of function of the brain. Among the frequent manifestations of encephalopathy are focal and diffuse neurologic signs, increased intracranial pressure, or changes lasting at least 6 hours in level of consciousness, with or without convulsions. The neurological signs and symptoms of encephalopathy

may be temporary with complete recovery, or may result in various degrees of permanent impairment. Signs and symptoms such as high pitched and unusual screaming, persistent unconsolable crying, and bulging fontanel are compatible with an encephalopathy, but in and of themselves are not conclusive evidence of encephalopathy. Encephalopathy usually can be documented by slow wave activity on an electroencephalogram.

(B) If in a proceeding on a petition it is shown by a preponderance of the evidence that an encephalopathy was caused by infection, toxins, trauma, or metabolic disturbances the encephalopathy shall not be considered to be a condition set forth in the table. If at the time a judgment is entered on a petition filed under section 2111 [42 USCS § 300aa-11] for a vaccine-related injury or death it is not possible to determine the cause, by a preponderance of the evidence, of an encephalopathy, the encephalopathy shall be considered to be a condition set forth in the table. In determining whether or not an encephalopathy is a condition set forth in the table, the court shall consider the entire medical record.

(4) For purposes of paragraphs (2) and (3), the terms "seizure" and "convulsion" include grand mal, petit mal, absence, myoclonic, tonic-clonic, and focal motor seizures and signs. If a provision of the table to which paragraph (1), (2), (3), or (4) applies is revised under subsection (c) or (d), such paragraph shall not apply to such provision after the effective date of the revision unless the revision specifies that such paragraph is to continue to apply.

APPENDIX L – EXCERPT OF STATUTORY PROVISIONS, DEFINITION OF VACCINE INJURY AND SIGNIFICANT AGGRAVATION

§ 300aa-33. Definitions

For purposes of this subtitle [42 USCS §§ 300aa-10 et seq.]:

> (4) The term "significant aggravation" means any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health.
>
> (5) The term "vaccine-related injury or death" means an illness, injury, condition, or death associated with one or more of the vaccines set forth in the Vaccine Injury Table, except that the term does not include an illness, injury, condition, or death associated with an adulterant or contaminant intentionally added to such a vaccine.

APPENDIX M – EXCERPTS OF THE VACCINE RULES OF THE OFFICE OF SPECIAL MASTER OF THE UNITED STATES CLAIMS COURTS, APPENDIX J RUSCC.

(d) Content of the Petition. (1) The petition shall set forth a short and plain statement of the grounds for an award of compensation. The petition shall set forth to whom, when and where the vaccine in question was administered and further shall describe specifically the alleged injury. If an injury within the Vaccine Act's Vaccine Injury Table, 42 U.S.C. § 300aa-14(a), is claimed, the particular injury shall be set forth. The petition shall also contain a specific demand for relief to which petitioner asserts entitlement or a statement that such demand will be deferred pursuant to 42 U.S.C. § 300aa-11(e).

(2) Only one petition may be filed with respect to each administration of a vaccine.

(e) Documents Required with the Petition. (1) As required by 42 U.S.C. § 300aa-11(c), every petition shall be accompanied by the following: (i) medical records and detailed affidavit(s) supporting all elements of the allegations made in the petition. If petitioner's claim does not rely on medical records alone, but is based in part on the observations or testimony of any persons, the substance of each person's proposed testimony in the form of an affidavit executed by the affiant must accompany the petition. (ii) All available physician and hospital records relating to (1) the vaccination itself; (2) the injury or death, including, if applicable, any autopsy reports or death certificate; (3) any post-vaccination treatment of the injured person, including all in-patient and out-patient records, provider notes, test results and medication records; and, if the person was younger than 5 years old when vaccinated, (4) the mother's pregnancy and delivery and the infant's lifetime, including physicians' and nurses' notes and test results and all well baby visit

records as well as, growth charts, until the date of the vaccination. (iii) If any records required by the rules are not submitted, an affidavit detailing the efforts made to obtain such records and the reasons for their unavailability.

(2) If filed on behalf of a deceased person, or if filed by someone other than the injured person or a parent of an injured minor, the petition shall also be accompanied by documents establishing the authority to file the petition in a retrospective capacity or a statement explaining when such documentation will be available.

(3) All documents accompanying the petition shall be assembled into one or more bound volumes or three-ring notebooks. Each bound volume or notebook must contain the caption of the case and a table of contents, and all pages of all documents shall be numbered consecutively.

(4) Petitions not accompanied by all the documents required by statute and the Vaccine Rules, or an affidavit explaining why any missing required documents are unavailable, will not be filed by the clerk.

II. PROCEEDINGS BEFORE THE SPECIAL MASTER

3. Role of the Special Master--Generally (a) Assignment. Once a petition has been filed by the clerk, the case shall be assigned by the chief special master to a special master to conduct proceedings in accordance with the Vaccine Rules. All proceedings prior to the issuance of the special master's decision are to be conducted exclusively by the special master.

(b) Duties. The special master shall be responsible for conducting

all proceedings, including requiring such evidence as may be appropriate, in order to prepare a decision, including findings of fact and conclusions of law, determining whether an award of compensation should be made under the Vaccine Act and the amount of any such award. The special master shall determine the nature of the proceedings, with the goal of making the proceedings expeditious, flexible, and less adversarial, while at the same time affording each party a full and fair opportunity to present its case and creating a record sufficient to allow review of the special master's decision.

(c) **Absence; Reassignment.** In the absence of the special master to whom a case is assigned, the chief special master may act on behalf of the assigned special master, or designate another special master to act. When necessary, the chief special master may reassign a case to another special master.

4. Respondent's Review and Report (a) Respondent's Review of Completeness of the Records. Within 30 days of the filing of a petition, respondent shall review the medical and other records to determine whether, in respondent's view, all records necessary to enable respondent to evaluate the merits of the claim have been supplied with the petition. If respondent's representatives considers that relevant records are missing, petitioner's counsel shall immediately be notified. If the parties disagree about the completeness of the records filed or the relevance of requested records, either party may request that the special master resolve the matter. If the special master concludes that records called for by Vaccine Rule 2(e) have not been submitted, the petition may be subject to dismissal, without prejudice, under Vaccine Rule 21(c).

(b) **Respondent's Report.** Within 90 days after the filing of the

petition, respondent shall file a report that shall set forth a full and complete statement of respondent's position as to why an award should or should not be granted. The report shall contain respondent's medical analysis of petitioner's claims. It shall also present any legal arguments that respondent may have in opposition to the petition. General denials are not sufficient.

5. Informal Review and Tentative Findings and Conclusions.

The special master shall schedule an off-the-record conference to be held within 30 days of the filing of respondent's report pursuant to Vaccine Rule 4(b). At this conference, after affording the parties an opportunity to address each other's positions, the special master will review the materials submitted, evaluate the respective positions, and orally present tentative findings and conclusions. If necessary, the special master shall schedule a subsequent status conference to be held within 15 days at which petitioner and respondent shall advise whether either party requests further proceedings, including filing of dispositive motions or a hearing, or whether the special master should enter a decision consistent with the tentative findings and conclusions.

6. Status Conferences

The special master shall conduct conferences from time to time in order to expedite the processing of the case. The conferences will be informal in nature and ordinarily will be conducted by telephone conference call. Either party may request a status conference at any time. At such conferences, counsel for both parties will have the opportunity to propose procedures by which to process the case in the least adversarial, most efficient way possible.

Appendix M

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8. Taking of Evidence and Argument; Decision (a) General. The special master in each case, based on the specific circumstances thereof, shall determine the format for taking evidence and hearing argument. The particular format for each case will be ordered after consultation with the parties.

(b) **Evidence**. In receiving evidence, the special master will not be bound by common law or statutory rules of evidence. The special master will consider all relevant, reliable evidence, governed by principles of fundamental fairness to both parties. Evidence may be taken in the form of documents, affidavits, oral testimony at a hearing in person or via telephone; or even, in appropriate circumstances, video tape. Sworn written testimony may be submitted in lieu of oral testimony.

(c) **Argument.** Argument may be received by telephone conference call or at a hearing or in written submissions. The special master may establish requirements for such filings, e.g., contents or page limitations, as appropriate.

(d) **Decision Without Evidentiary Hearing**. The special master may decide a case on the basis of written filings without an evidentiary hearing. In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RUSCC 56 modified to the needs of the case.

(e) **Hearing**. When necessary, the special master may conduct an evidentiary hearing. The special master will determine the format for such a hearing. The special master may permit testimony at such a hearing via telephone. The special master may permit direct examination of a witness or may permit or require that the direct

testimony be submitted in written form. The special master may question a witness and may, on request, permit questioning by opposing counsel. The clerk, on request, may issue a subpoena requiring the attendance of a witness at such hearing. A transcript of the hearing shall be prepared in conformity with RUSCC 39(b) and 80 and Appendix A.

APPENDIX N - EXCERPTS FROM THE UNITED STATES CLAIMS COURT VACCINE GUIDELINES

The special master's role is somewhat different from that of an adjudicator in traditional litigation. The special master will be more actively involved in the early stages of proceedings than is usually the case with a judge in traditional civil proceeding, *e.g.*, identifying and assisting a party in obtaining information, making tentative findings where appropriate (*see* Section VI, *infra*), getting the parties to clarify their positions, and working actively with the parties to develop a streamlined method for resolving each particular case. Further, in recognition of Congress' intent that the special masters be more "inquisitorial" than in typical litigation, the special master will question witnesses where appropriate, ask for more documents when such a need is determined, and keep the parties informed at all stages concerning what further proof is necessary to prove their cases. In unusual instances, special masters may hire and utilize their own expert witnesses to resolve difficult medical issues, or suggest the hiring of a neutral medical expert to render an opinion on a medical dispute.

In general, however, the parties are responsible for the traditional tasks of identifying and developing information supporting or opposing an award, securing and presenting fact witnesses and expert testimony, and meeting their respective burdens of proof.

VI. "RULE 5" CONFERENCE -- INFORMAL REVIEW BY THE SPECIAL MASTER

Under the Program, claim resolution will be more expeditious and less formal than under traditional litigation. To this end, Vaccine Rule 5 sets forth a procedure that should speed and simplify the decision-making process. Under the Rule, the special

master, after reviewing the petition and respondent's report, conducts an informal conference (either person or by telephone) at which the special master (1) gives each party an opportunity to address the other's position, (2) states a tentative view as to the merits of the case, and (3) establishes with the parties what issues remain to be addressed and the most efficient means for deciding those issues.

The success of the "Rule 5 conference" depends upon the completeness of the petition and report. For that reason, it is essential that each party fully develop its case before filing the petition or report, and set forth *fully and completely* the substance of its case therein. Information cannot be withheld or acquired later to be supplied at subsequent stages of the proceedings. The benefits from this early, full discussion of the case's substance include:

--early notice of any deficiencies in the case in time to rectify such deficiencies;

-- a third party's view of the merits of the case, possibly fostering settlement;

-- if settlement is not possible, an opportunity to narrow the issues through stipulation;

--if further proceedings are necessary, a discussion of the nature and timing of such proceedings;

-- where appropriate, a final decision.

Please note, however, that any tentative conclusions noted by the special master at the Rule 5 conference are just that --

"tentative," as well as "off the record." The special master's comments will not have any official status and cannot be "relied upon" in any formal sense. Additional evidence, argument, or further consideration by the special master may change the special master's view of the case.

VII. STATUS CONFERENCES

As stated in Vaccine Rule 6, the special master will conduct status conferences from time to time in order to expedite the processing of the case. Normally, these conferences will be conducted by telephone. While the first such conference must be held no later than 30 days after the respondent's report is filed (the "Rule 5" conference), conferences may be held prior to the filing of the respondent's report (*e.g.*, when necessary to resolve an issue concerning the completeness of the petition).

These conferences will be informally conducted and are intended to *assist* practitioners and the special masters, not burden them. For example, the participation on behalf of a party by a knowledgeable person other than the attorney of record may be permitted. Also, at such conferences, counsel for both parties will have the opportunity to propose procedures by which to process the case most efficiently. Counsel are encouraged to make use of these opportunities, and to feel free to suggest creative ways to expedite a case. Counsel are urged to consult with each other outside of status conferences, and thus to be able to jointly propose procedures or stipulate to portions of the case.

Practitioners are also invited to use status conferences to make the special master aware of developments in the case. Either party may request a status conference at any time, by telephoning the special master's office.

Appendix N

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IX. PROCEDURES FOR TAKING EVIDENCE AND ARGUMENT

As Vaccine Rule 8 makes clear, the special masters are not bound by formal Rules of Evidence. The special masters will devise procedures for the taking of evidence and argument based on the circumstances of a given case. Practitioners are encouraged to be creative and to take the initiative in suggesting ways in which the record can be constructed more speedily and less expensively. However, as stated above, ensuring fairness to both parties and creating a complete and orderly record are crucial.

As explained above, the primary documentary evidence of a party should be attached to the petition or report. Further documents, however, may be submitted in accordance with procedures agreed upon by the special master. All such documents, *including* affidavits, should be given exhibit numbers (or letters, by respondent) *consecutive* to those exhibits already submitted, including those submitted with the petition or report. (*E.g.*, if Exs. 1 through 12 were submitted with a petition, further documents submitted by petitioner, even those submitted at a hearing, should be numbered Ex. 13, Ex. 14, etc.) Attached should be a simple "Notice of Filing Document," an example of which is at Appendix B *infra*.

Clearly, extensive evidence can be presented without the need for an evidentiary hearing. Documents will ordinarily *not* be subject to formal authentication procedures, unless there is some particular reason to doubt their authenticity. Factual testimony may be presented in affidavit or sworn declaration form, and even opinion testimony may be presented in written form, preferably in

sworn format as well. In addition, a party may desire to present testimony in the form of videotape.

If an evidentiary hearing is necessary, several options are available. Witnesses may testify "in person" at a hearing held in Washington or elsewhere at the special master's discretion. (If multiple witnesses reside at a single location, ordinarily the special master will hold the hearing at or near that location. The site for a hearing will be chosen with a view to the maximum convenience for all involved and the minimum overall cost to the Program.) Alternatively, oral testimony may be taken via telephone conference call. (It is also possible for some witnesses to appear "in person"and some by telephone.)

The special master will ordinarily accept a party's evidence in the form desired by the party. A caveat is in order, however, with respect to the *weight* to be given different types of evidence. Both factual testimony and opinion testimony can in some circumstances be more valuable and credible if the declarant is available for questioning and explanation of the testimony. For example, if the diagnosis of a certain "Table injury" is dependent solely upon eye-witness accounts regarding symptoms displayed by the vaccine recipient, the credibility of such testimony becomes paramount and thus in order to make a convincing case, a petitioner may wish to present oral testimony of such witnesses. Similarly, the value of expert witness testimony in many cases -- especially where two experts draw contrasting conclusions from the same facts -- may depend on the ability of the expert to explain and answer questions concerning that expert's opinion.

Two other points concerning oral testimony are worthy of note. First, while a witness testifying orally will always be subject to questioning by the special master, questioning of a witness by

opposing counsel will not be a matter of right, but will be within the special master's discretion. While ordinarily some such questioning will be permitted, the special master will prohibit unnecessarily lengthy, irrelevant, or repetitive examination. Therefore, questions must be germane to the merits of the case and further the development of the record.